90-446

NO. _____

Supreme Court, U.S.
FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

W.R. BENINTENDI and DELORES BENINTENDI

Petitioners

vs.

UNION NATIONAL BANK OP LITTLE ROCK, PHILIP WAYNE REED, WESTERN NATIONAL BANK, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, and ANTOINETTE LYNN REED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION III, OF THE STATE OF OKLAHOMA

JOHN M. YOUNG
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(918) 224-3131
ATTORNEY FOR PETITIONERS

3/B1:10

QUESTIONS PRESENTED

Whether the application of certain state statutes and decisions by the state court below to the facts in the case at bar deprive the petitioners of their property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States.*

*All parties to the proceeding in the state courts below are listed in the caption of the case in this court.

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OPENING STATEMENT

W.R. Benintendi and Delores Benintendi, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of Oklahoma, Division III, entered in the state court below on December 19, 1989 which the Supreme Court of the State of Oklahoma declined to review by Petition for Certiorari pursuant to an order entered on May 8, 1990.

JUDGMENTS OF THE COURTS BELOW

The order of the Supreme Court of the State of Oklahoma entered in the case below (unreported) on May 8, 1990 and denying certiorari is found in page 1 of Appendix A. The memorandum opinion of the Court of Appeals of the State of Oklahoma, Division III, filed on December 19, 1989 is found on pages 2 through 8 of Appendix A. The journal entry of judgment of the trial court entered in the District Court of Tulsa County, State of Oklahoma Case #CJ-86-7721 entered on April 13, 1987 and filed on May 26, 1987 is contained in pages 9 through 13 of Appendix A, and the journal entry of judgment entered by the District Court of Tulsa County, State of Oklahoma in Case #CJ-87-4317 entered on April 24, 1987 and filed on August 26, 1987 is attached as pages 14 through 18 of Appendix A. The appeals of the two trial court journal entries of judgment were consolidated for purposes of appeal.

JURISDICTION

The judgment of the state court sought to be reviewed by this Honorable Court was entered by the Court of Appeals, Division III, on December 19, 1989. The petitioners thereafter petitioned for rehearing of this decision which was denied by said Court of Appeals on February 5, 1990. The petitioners then timely filed on February 26, 1990 a petition for certiorari before the Supreme Court of the State of Oklahoma to review this decision. That petition for certiorari was denied by order entered by the Supreme Court of the State of Oklahoma on May 8, 1990. The judgment of the Court of Appeals is therefore the judgment of the highest court of the State of Oklahoma and is reviewable by the Supreme Court of the United States since the highest court of the state declined to review it, Mellon v. O'Neil, (1927) 275 U.S. 212, 72 L.Ed 245, 48 S.Ct. 62; Bacon v. Texas, (1896) 163 U.S. 207, 42 L.Ed 132, 16 S.Ct. 1023; Michigan Wisconsin Pipe Line Co. v. Calvert (1954) 347 U.S. 157, 98 L.Ed 583, 74 S.Ct. 396, reh den 347 U.S. 931, 98 L.Ed 1083, 74 S.Ct. 528; Sullivan v. Texas (1908) 207 U.S. 416, 52 L.Ed. 274, 28 5. Ct. 215; Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 U.S. 300, 61 L.Ed 1153, 37 S.Ct. 643; Adam v. Saenger (1938) 303 U.S. 59, 82 L.Ed 649, 58 S.Ct. 454, reh den 303 U.S. 666, 82 L.Ed. 1123, 58 S.Ct. 640; American R. Express Co. v. Levee (1923) 263 U.S. 19, 68 L.Ed 140, 44 S.Ct. 11;Missouri, K. & T.R. Co. v. Elliott (1902) 184 U.S. 530, 46 L.Ed. 673, 22 S.Ct. 446; Interstate Circuit, Inc. v. Dallas (1968) 390 U.S. 676, 20 L.Ed. 2d 225, 88 S.Ct. 1298; Cohen v. California (1971) 403 U.S. IS, 29 L.Ed 2d 284, 91 S.Ct.1780, reh den 404 U.S. 876, 30 L. Ed 2d 124, 92 5. Ct. 26. Jurisdiction in the United States Supreme Court to review the aforesaid state court judgment by writ of certiorari is conferred by 28 U.S.Code Section 2101 (C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following amendments to the Constitution of the United States are involved:

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions of the State of Oklahoma involved are reproduced in Appendix B.

STATEMENT OF THE CASE

This case involves the appeal of the Oklahoma trial court's rulings in two separate cases the first of which was filed by the second mortgage holder of a tract of residential property to foreclose on its mortgage. Later the first mortgage holder filed a second suit also seeking foreclosure. The mortgage foreclosure proceedings were fraught with procedural errors. The sheriff's sale of the foreclosure of the second mortgage was conducted first at which the petitioners purchased the property under the understanding that they were purchasing the property free and clear of other claims (which was stated to be the case in the journal entry of judgment of the second mortgage holder's foreclosure suit). Thereafter the first mortgage holder sold the property at a subsequent sheriff's sale and was itself the successful purchaser, thereby extinguishing the rights of the petitioners. The petitioners objected to the confirmation of both sales and, following hearing and extensive briefing before the trial court, the trial court overruled the objections to confirmation of both sales and attempted to correct some of the procedural errors by orders nunc pro tunc. From these adverse and erroneous rulings, the appellants perfected two appeals which were consolidated by the Supreme Court of Oklahoma into one appeal. The facts are somewhat tedious to relate, as they involve the near simultaneous progress of the two foreclosure cases.

On December 4, 1986 the Western National Bank of Tulsa filed Tulsa County, Oklahoma case number CJ-86-7721 seeking foreclosure of residential real estate upon which it had a second mortgage executed by Phillip Wayne Reed. Joined as defendants were the Union National Bank of Little Rock, the first mortgage holder, and the law firm of Pray, Walker, Jackman, Williamson and Marlar, who had a third lien upon the property for legal services performed on behalf of Mr. Reed. The petition alleged a default in $36,390.98 in principal, together with the obligation to pay accrued interest, costs, and attorney fees of Philip Wayne Reed and Antoinette Reed. The defendant, Union National Bank, filed an answer consisting basically of a general denial with the reservation of a right to amend. It amended its answer on January 12, 1987, but still did not allege any default in the payment of the note secured by its first mortgage.

Western then filed a motion for summary judgment in CJ-86-7721 and the issues were reduced to judgment. Following hearing on April 13, 1987 [illegible] a journal entry of judgment was approved as to form and content by both the attorneys for the plaintiff, the Western National Bank and the first mortgage holder, the Union National Bank. The journal entry of judgment recited that the defendants, Phillip Wayne Reed and the attorney firm of Pray, Walker, Jackman, Williamson, and Marlar were in default and were therefore "barred, restrained, and enjoined from claiming any right, title, or interest in and to the subject property."

The journal entry of judgment ordered the foreclosure of the mortgage of Western upon the following described real property:

> The East Half of the South Three Hundred Twenty Feet (320) of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East, of the Indian Base and Meridan according to the United States Government survey thereof.

Any reference to the County and State of the Property ordered to be sold was omitted.

The journal entry of judgment also contained the following provisions:

> "9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof."

> "10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and improvements to the purchaser, who shall convey all the right, title, interest, estate and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall

place said purchaser in full and complete possession and enjoyment of said real property and improvements."

Particularly noteworthy of the April 13, 1987 journal entry of judgment in CJ-86-7721 is the complete omission of any ruling upon a mandatory counterclaim which must be asserted by any other defendant, in this case the Union National Bank which later claimed to have a defaulted first mortgage.

At any rate, on August 11, 1987 Western in CJ-86-7721 filed a notice of sheriff's sale and mailed a copy of the notice only to the defendants, Union National Bank and Phillip Wayne Reed. Omitted was any mailing to Pray, Walker.

In the meantime, the Union National Bank on July 6, 1987 filed Tulsa County case number CJ-87-4317 wherein it sought the foreclosure of its first mortgage upon the same legal description contained in the journal entry of judgment in CJ-86-7721, but with the addition of the recitation that the property was "an addition in the City of Broken Arrow, Tulsa County, State of Oklahoma. Included as an additional defendant was Antoinette Lynn Reed. Originally included as defendants, but later on August 20, 1987 dismissed as defendants without prejudice, were Jane Doe Reed, John Doe Resident, and Jane Doe Resident. Journal entry of judgment was entered in CJ-87-4317 on August 24, 1987 but filed on August 26, 1987. The CJ-87-4317 journal entry of judgment held that there were three valid liens and claims upon the property as follows: (1) the first mortgage lien of Union, (2) the second mortgage lien of Western, and (3) the third mortgage lien of Pray, Walker.

The day after the entry of the journal entry of judgment on August 24, 1987 in CJ-87-4317, a sheriff's sale was held in case number CJ-86-7721. Sheriff's appraisers in CJ-86-7721 appraised the property (again with an incomplete legal description) at $100,000.00. It was at the August 25, 1987 sheriff's sale in CJ-86-7721 that the petitioners, W.R. Benintendi and Delores Benintendi purchased the property for a bid of $32,000.00. No reference was contained in the notice of the August 25, 1987 sheriff's sale of the attorney fees entered in favor of Union in the journal entry of judgment in case number CJ-86-4317 in the amount of $5,455.00 nor of $219.00 for abstracting, advances for taxes and hazard

insurance of $113.00, all further costs for service of process, $60.00 for the costs of preserving and maintaining the property, $80.33 and all other late charges, court costs, etc. which was entered the previous day, but not filed of record until August 26, 1987. Details about the circumstances of the interest of the Benintendis in the property and their bid will follow.

Thereafter on September 10, 1987 the Union National Bank, the plaintiff in CJ-87-4317, filed an application for order nunc pro tunc to correct the journal entry of judgment in its case reflecting that the defendant Western National Bank and Pray, Walker were in default. Before the journal entry of judgment was modified, however, the defendant, Western National Bank in CJ-87-4317 filed a motion to vacate default judgment on September 21, 1987, although at that time they had not been defaulted. Thereafter on September 23, 1987 the court in CJ-87-4317 did file an order nunc pro tunc which corrected what was stated to be a scrivener's error by holding that both Western and Pray, Walker were in default in CJ-87-4317. That motion was set twice but never ruled upon.

On September 10, 1987 the plaintiff in CJ-86-7721 filed a motion to confirm its sheriff's sale (finally stating that the property was situated in Tulsa County, Oklahoma) on September 11, 1987. According to the affidavit of mailing filed in CJ-86-7721 on September 22, 1987, notice of the hearing on the motion to confirm sale was mailed to Phillip Wayne Reed, the Union National Bank, and Pray, Walker, but no notice was stated to be mailed to the purchasers, the petitioners herein, nor to Antoinette Lynn Reed who was a claimant in the property according to the pleadings in CJ-87-4317.

On September 15 1987, Union filed in CJ-86-7721 a motion praying that the proceeds of the second mortgage foreclosure sale held on August 25, 1987 be paid to it since it had a superior first lien, although the prayer in this motion was contrary to the provisions of the journal entry of judgment which it had previously agreed to as to form and content.

The petitioners by this time realized that serious mistakes had been made with the sheriff's sale procedures in the two related cases. They filed a motion to set aside and vacate the August 25, 1987 sheriff's sale in CJ-86-7721 on September 24, 1987. Shortly thereafter, Union in CJ-87-4317 filed its notice of sheriff's sale to be held on October 29, 1987. The sheriff's sale in CJ-87-

4317 was then conducted on October 29, 1987 and the property, appraised in this case for $90,000.00 was sold to the plaintiff, Union National Bank, for $61,588.01. On October 29, 1987 a motion to confirm this sale was filed and mailed to all parties. The petitioners, through their present counsel, filed a Motion to Intervene, Motion to Consolidate, and an Objection to Confirmation of Sale on November 24, 1987. A supplement to the petitioners' objection to confirmation on the sale was filed on December 21, 1987.

Following a hearing the court in CJ-86-7721 denied the petitioners' motion to set aside and vacate the sheriff's sale and confirmed it on October 28, 1987. The petitioners, however, through their present counsel, timely filed a motion for a new trial.

Following supplemental briefing by the parties of their respective positions on the issues of whether or not either or both of the sales should be confirmed and whether or not the cases should be consolidated, the motions and objections were all set for hearing before the same trial judge on December 21, 1987.

After taking his decision under advisement, the trial court, on January 20, 1988 entered a minute order in the case. Without specifically ruling on the motions to consolidate, the court confirmed both sales and overruled all objections thereto filed by these petitioners. The effect of the rulings was that the petitioners' $32,000.00 purchase price was paid to the second mortgage holder to purchase its interest which was shortly cancelled by the first mortgage holder's foreclosure sale.

Several factual issues were raised in two evidentiary hearings held in the cases on October 23, 1987 and on December 21, 1987. The first hearing on October 23, 1987 was in CJ 86- 7721 and was the hearing on the motion to confirm sale and the objections filed by the appellants thereto. One of the questions was what the petitioners' understanding was regarding the existence of the first mortgage in bidding to buy the second mortgage, and what action, if any, by the plaintiff, the Western National Bank, prompted their actions. Prior to the foreclosure sales, the petitioners through a realtor had attempted to purchase the property, but, because of the foreclosures, the efforts to purchase the property through a realtor never reached fruition. Because, however, a written offer was presented by the petitioners (although it was not accepted), nevertheless, the mortgage holders were aware of their interest acquiring

in the property. The petitioner, Delores Benintendi, testified that she had a conversation with Steve Howe, an officer of the Western National Bank, who advised her that an auction would be held to sell to property on August 25 at 10:00 a.m. Her statement concerning the content of the conversation appears at page 16 of the October 23 and 28, 1987 transcript as follows:

> "A: Well, he mentioned — first of all, he asked me how much are you planning to bid. Well, it just caught me off guard, and I didn't know what I was going to bid at a sale, you know. I just said that depends. I don't know. That depends, and I said how much are you going to bid, you know, I just — and he said, well, the first mortgage has to be satisfied, you know, as far as, you know, they would satisfy the first mortgage, but, you know, I just thought they was going to satisfy the first mortgage. I couldn't imagine them bidding so low to start with.
>
> Q: And it was your belief that they were going to take care of that first mortgage?
>
> A: Yes, yes, or that somehow they would just write some of it off. I didn't know. I had heard some incredible things of write offs today with foreclosures."

Following this conversation with Mr. Howe, Mrs. Benintendi did appear at the sheriff's sale. She testified at page 15 was follows:

> "Q: Did the sheriff, in announcing the sale, say that this property was being sold subject to a first mortgage?
>
> A: I didn't hear him say subject to. I heard him say there was a first mortgage on it, and evidently he did, but I wouldn't have known what it meant anyway.
>
> Q: When you bid the thirty-two thousand dollars, did you — was it your thought that that was the total purchase price of this piece of property?
>
> A: Yes, definitely, yes."

No reference was made at the sheriff's sale as to any attorney fees which were in fact owed to the Union National Bank in the amount of $5,455.00 nor of any of the other miscellaneous costs totalling approximately $472.33 (October 23, and 28, 1987 transcript page 28).

On December 21, 1987 the court considered argument of counsel and the additional testimony from two witnesses in CJ-86-

7721 and argument on the motion to confirm sheriff's sale and objections thereto in CJ-87-4317.

Additionally, the petitioners called a carpenter as a witness who had visited the property on approximately Labor Day weekend and approximately the 25th or 26th of September. He observed certain items of vandalism damage to the premises in the interim which he estimated to be over $10,000.00.

Mrs. Benintendi also testified that she would not have been willing to purchase the property at the August 25, 1987 sale had the extensive damage which existed on the premises at the time of confirmation of the sale existed at the time of the sale.

Also important to note during the argument of counsel at the December 21, 1987 hearing was that the trial court agreed there was a mistake of fact in the Benintendis' purchase of the property and that counsel for the Western National Bank acknowledged there was a "defect in the terminology of the journal entry." Counsel, however, contended it was merely a scrivener's error which should be corrected by an application nunc pro tunc. Counsel for the appellants argued that if Mrs. Benintendi was mistaken as to the interest on which she was bidding and purchasing at the August 25, 1987 sale, the journal entry nevertheless stated exactly what Mrs. Benintendi thought the situation and terms of the purchase were.

The trial court stated at the outset of the hearing that "if there was any way I could legally find for the Benintendis in this case, that I would do that." Nevertheless, although numerous errors in both proceedings were pointed out to the court, the court by minute order entered on January 20, 1988 overruled the petitioner's motion for new trial and confirmed the second sale of the property to the Union National Bank over the petitioners' objections, thereby extinguishing the interest which they purchased at the first foreclosure sale for $32,000.00 in cash.

On appeal which was presented to the Court of Appeals, the intermediate appellate court of the State of Oklahoma, the petitioners demonstrated that the proceedings to reduce the issues to judgment in both cases and the execution sales conducted pursuant to those judgments were in direct violation of certain Oklahoma Statutes, specifically 12 O.S. Section 2013 (a) which provides for mandatory counterclaims. Additionally the journal entry of judgment as entered in case number CJ-86-7721 accorded full relief to

the parties. This journal entry of judgment was approved as to both form and content by the attorneys for both banks. The journal entry of judgment as set forth above recited specifically the petitioners' understanding of the terms of the sheriff's sale at which they purchased the property, but after the sheriff's sale, at the request of counsel for Western, the court amended the journal entry of judgment by order nunc pro tunc to provide that the petitioners purchased only a second mortgage and not the entire interest in the property.

Furthermore, 12 O.S. Section 762 provides that all execution sales of property must be for at least 2/3 of the appraised value. The property was appraised for $100,000.00 but as previously stated it sold to the petitioners for $32,000.00. The court, contrary to the express requirement of statute, however, and contrary to its original journal entry of judgment in CJ-86-7721, circumvented this requirement of law by deducting from the appraised value the amount of the first mortgage. That sale was therefore a nullity under Oklahoma Statutes, but the trial court nevertheless confirmed the sale and this action was affirmed by the Court of Appeals.

The notice of sale in the case was also defective because it was not mailed to the defendant, Pray, Walker, in CJ-86-7721 which is required by 12 0.5. Section 764 (1). Additionally the notice of sale was further defective because it failed to announce that the sale would be subject to attorney fees and costs of almost $6,000.00 which were added to the first mortgage thereby significantly reducing whatever equity would have been purchased by a purchaser of the second mortgage at a properly conducted sale.

Although no Oklahoma statute specifically addresses the question, common law generally requires that there be no material damage to the premises from the time of the sale until the confirmation of that sale at which time title is passed to the purchaser. Evidence was introduced that vandalism of approximately 1/3 the total purchase price paid by the petitioners occurred to the premises between sale and confirmation. Nevertheless the courts did not find this to be material.

Above all, the courts of the states and of the United States are under an important duty to insure that the litigants before them receive equity and justice in the adjudication of their disputes. In the case at bar, mistakes were made by both the banks in the

conduct of their sales and by the petitioners in their attempt to purchase all of the property for $32,000.00. The net result is that the petitioners have been deprived of $32,000.00 of their own funds but have no interest in the property.

The petitioners then perfected appeals of the trial court's decisions confirming both sheriff sales. The appeals were consolidated and a decision was rendered by the Oklahoma Court of Appeals on December 19, 1989 affirming the judgment of the trial court which incredibly found no violation of Oklahoma statutory or case law on the various issues raised by the petitioners. The petitioners petitioned for rehearing which was denied and then for certiorari to the Oklahoma Supreme Court which was also denied. The decision of the Oklahoma Court of Appeals therefore stands as the final decision of the highest court of the State of Oklahoma.

That decision clearly violates the constitutional rights of the petitioners not to be deprived of their property without due process of law as guaranteed to them by the 5th and 14th Amendments of the United States Constitution, for as previously held by the Supreme Court of the United States in International Harvester Credit Corporation v. Goodrich (1956) 350 U.S. 537, 100 L.Ed. 681, 76 S.Ct. 621 at page 549:

> "Property is included within the triad of interests protected by the Due Process Clause of the 14th Amendment—"nor shall any State deprive any person of life, liberty, or property, without due process of law." When one man's property is taken and given to another or, as in this case, is taken to satisfy the debts of another, a justifying public purpose must meet the requirements of the Due Process Clause.

The Supreme Court of the United States has also inquired into the state court's compliance with federal standards of due process in the application of state law to the facts of a particular case as in Thompson v. Consolidated Gas Utilities Corp. (1937) 300 U.S. 55, 81 L.Ed. 510 at page 75 which held in part as follows:

> "But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the

> intention of the lawmakers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution."
>
> * * * *
>
> "But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer."

Furthermore, it has been held that the Supreme Court of the United States will make a constitutional inquiry even though specific reference to constitutional violations does not appear before the court below if it sufficiently appears by a clear and necessary intendment that a federal question was presented. Furman v. Nichol (1869) 8 Wall. (U.S.) 44, 19 L.Ed 370; Steines v. Franklin County (1872) 14 Wall. (U.S.) 15, 20 L.Ed. 846; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. (1891) 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173.

REASONS FOR GRANTING WRIT

By an erroneous and convoluted application of Oklahoma case and statutory law, the petitioners have been deprived of $32,000.00 in cash to purchase what is in effect a void interest in property. They have thus been deprived of that property without meeting the due process requirements of Amendments 5 and 14 of the United States Constitution and this Honorable Court should grant certiorari to review the full record in the case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

John M. Young
OBA ID #9964
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(918) 224-3131

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of July, 1990, I mailed a true and correct copy of the foregoing instrument with postage prepaid to the following:

Oklahoma Supreme Court Clerk
Oklahoma City, OK

Julie Thomas Rowland
Zarbano, Bridger-Riley
Attorney for Western National Bank of Tulsa
5051 South Lewis, 2nd Floor
Tulsa, Oklahoma

William D. Hunt
Attorney for Union National Bank
P.O. Box 35606
Tulsa, Oklahoma 74153

Philip Wayne Reed
Marie Antoinette Reed
8723 Winding Trail
Fort Worth, TX

John M. Young

APPENDIX A

(Reproduction)

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday May 8, 1990

THE CLERK IS DIRECTED TO ISSUE THE
FOLLOWING ORDERS:

70,354 (consolidated with 70,355) Western National Bank of Tulsa, a national banking association et al. v. W.R. Benintendi and Delores Benintendi.
Certiorari denied.
All Justices concur.

(filed on December 19, 1989)

NOT FOR PUBLICATION

IN THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

DIVISION NO. III

WESTERN NATIONAL BANK OF TULSA, a national banking association,	)	
APPELLEE,	)	
vs.	)	No. 70,354
	)	cons. w/
	)	No. 70,355
UNION NATIONAL BANK OF LITTLE ROCK,	)	
APPELLEE,	)	
Phillip Wayne Reed, a single man, Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma professional corporation, Defendants,	)	
and	)	
W. R. Benintendi and Delores Benintendi,	)	
APPELLANTS.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANIEL J. BOUDREAU, JUDGE

AFFIRMED

John M. Young,
YOUNG & YOUNG,
Sapulpa, Oklahoma — For Appellants,

Julie Thomas Rowland,
ZARBANO BRIDGER-RILEY, P.C.,
Tulsa, Oklahoma — For Appellee Western Bank

William D. Hunt,
WILLIAM D. HUNT & ASSOCIATES,
Tulsa, Oklahoma — For Appellee Union Bank

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Chief Judge.

Appellants seek review of the Trial Court's orders denying Appellants' motion for new trial and confirming sheriff's sales. Appellee Union National Bank of Little Rock (Union) held a first mortgage executed by Defendant Reed covering certain property in Broken Arrow, Oklahoma, in the principal sum of about $62,000. Appellee Western National Bank of Tulsa (Western) held a valid second mortgage from Reed covering the same property in the sum of about $28,000. In December, 1986, upon default by Reed, Western filed its Petition for foreclosure of its second mortgage, naming Reed, Union and defendant professional corporation as interest holding defendants. Union filed its answer, asserting the superiority of Union's first mortgage. Reed and the professional corporation filed no appearance or answer and were adjudged in default.

In February, 1987, Western filed its motion for summary judgment, seeking foreclosure of its second mortgage subject to the first mortgage claim of Union. By agreed journal entry signed by Union and Western in May 1987, Western obtained judgment of foreclosure of its second mortgage, subject to the superior first-mortgage claim of Union. In July 1987, Union filed a separate action seeking foreclosure of its first mortgage.

Western then sought Special Execution and Order of Sale on the property in fulfillment of its judgment. Western had the property appraised, value determined at $100,000 and in August, 1987, published notice of sheriff's sale of the property subject to the valid first mortgage of Union. At sheriff's sale on August 25, 1987, it was announced that the sale of the property was subject to a mortgage claim. Appellant Delores Benintendi appeared at the sheriff's sale and submitted a bid on the property in the sum of $32,000, which was accepted as the highest and best bid.

On August 26, 1987, the day after sheriff's sale and purchase of the property thereat by Appellants, Union filed its journal entry of judgment obtained August 24, 1987, which recited Western's failure to appear and granted foreclosure of Union's first mortgage. On September 10, 1987, Western filed its motion to confirm the previous sheriff's sale. On September 24, 1987, Appellants filed their Motion to Set Aside the sheriff's sale, asserting, in essence,

that they were fraudulently induced to purchase the property at sheriff's sale by representations of Western and/or its counsel that the purchase of the property at sheriff's sale was free of any incumbrances of Union or others.

After hearing on Appellants' motion, the Trial Court issued its order confirming Western's sheriff's sale to Appellants, subject to the first mortgage claim of Union. Appellants filed their Motion for New Trial in Western's action, again seeking to avoid Union's superior claim, and further alleging damage to the property, entitling Appellants' to avoid their purchase. Appellants also filed a motion to consolidate the separate foreclosure actions of Western and Union.

On October 29, sheriff 's sale in Union's foreclosure action took place, at which Union was the highest and best bidder, and Union moved to confirm the sale. Appellants moved to intervene in Union's action and objected to confirmation of the sale to Union. Appellants filed amendments to their motion for new trial in Western's action, and all remaining matters in both cases came on for hearing. The Trial Court denied Appellants' motion for new trial arising from confirmation of the Western sale, and overruled Appellants' objection to confirmation of the Union sale. Appellants now seek review of the Trial Court's ruling on the Western sale (Case No. 70,354) and on the Union sale (Case No. 70,355). The cases have been consolidated under surviving case No. 70,354 for resolution.

In five subsections of their first proposition of error, Appellants argue the Trial Court erred in denying their motion for new trial arising from the Western sale and confirming the Union sale for irregularity in both sale proceedings. In the first subsection, Appellants allege that 12 O.S. Supp. 1984 Section 2013(A), governing compulsory counterclaims, required Union to press its superior first mortgage claim in Western's prior suit to foreclose the second mortgage, failure which divested the Trial Court of jurisdiction to entertain Union's subsequent and separate action for foreclosure of the first mortgage. We find, because Western never asserted that its claim was superior to that of Union, that Union was not an indispensable party to the resolution of Western's claim. See, Penner v. State, ex rel. Comm'rs of Land Office, 302 P.2d 144 (Okl. 1956). Therefore, any claim Union might have had

was in the nature of a permissive counterclaim, and failure of Union to set up such a permissive claim in the prior action did not divest the Trial Court of jurisdiction to entertain Union's subsequent action.

In the second subsection, Appellants assert error of the Trial Court in granting Western's oral application for nunc pro tunc amendment of the journal entry in Western's case to reflect (1) correction of the legal description of the property and (2) that Western's judgment of foreclosure was inferior to Union's superior first mortgage claim. In this regard, the journal entry of judgment, as originally prepared and executed by the parties and Court, clearly established that Western's claim was junior and inferior to the claim of Union, but contained conclusory language to the effect that all parties' claims were forever and thereafter barred. Western asserted that this inconsistency within the journal entry was the result of scrivener's error and should be corrected. As we find no reason to dispute Western's allegations of scrivener's error, we find no error by the Trial Court in correcting the journal entry of judgment by order nunc pro tunc to remove any inconsistencies. See e.g., Appl. of Okla. Nat. Gas Co., 715 P.2d 477 (Okl. 1985) (function of order nunc pro tunc to supply omission on the record of action taken but inadvertently omitted.)

In the third subsection, Appellants argue that the Trial Court erred in denying their Motion for New Trial for failure of the Western sale to bring two-thirds of the appraised value of the property. We disagree. The property appraised for $100,000, and by the terms of the Western journal entry and notice of sale, was subject to Union's prior mortgage, then amounting to about $57,200. Thus, the sale to Appellants for $32,000 was in an amount in excess of two-thirds of the value of the equity in the property after deduction of the first mortgage amount, and was proper under 12 O.S. 1981 Section 762. Miller v. American Bank & Trust Co., 171 Okl. 99, 40 P.2d 1074 (1935); Hewitt v. Voils, 147 Okl. 270, 296 P. 447 (1931). The Trial Court's denial of Appellant's Motion for New Trial based on alleged insufficiency of the sheriff's sale price was therefore unaffected by error.

In the fourth subsection, Appellants argue inadequacy of the notice of sheriff's sale issued in the Western case due to failure of the notice to specify the amount of attorneys' fees and costs

awarded to Union in Union's action. In the fifth subsection, Appellants assert that Union's failure to file its judgment with the County Clerk under 12 O.S. 1981 Section 706 rendered Union's judgment void. Western's failure to notify prospective purchasers of Union's claim for attorney's fees has no effect on the Western sale, as the attorney fees and costs awarded to Union arose from an action properly separate and distinct from Western's action. The failure of Union to register its judgment with the clerk under Section 706 affects only the validity of the judgment as a lien on the judgment debtor's other property within the county, and again has no effect on the validity of the Union sheriff's sale.

In their second proposition of error, Appellants assert that there was substantial damage to the property between Appellants' inspection of the property before and after the sale. In the main, Appellants assert that a metal storage building on the property at the time of their initial inspection was removed at some time between their inspection and purchase at sheriff's sale, and that this constitutes "material damage" to the property so as to justify relieving Appellants of their obligation to purchase. See, 55 Am.Jur. 2d Mortgages Section 846 ("A purchaser at a mortgage foreclosure sale may be relieved of his obligation where, after the date of sale, but before conveyance is made, the property is destroyed or materially damaged.")

While we have found no Oklahoma authority directly on-point, and while we have no doubt such a rule would be applied in this state under the proper circumstances, we do not find such to be the case herein. The Trial Court heard the evidence of "damage," and tacitly rejected this argument. Any relief which the Trial Court might grant in such a case is purely equitable, and as with equity decisions by the Trial Court generally, the lower court's determinations will not be disturbed unless against the weight of the evidence or affected by abuse of discretion. We find the Trial Court's implicit rejection of Appellants' assertion of vitiating "damage" neither contrary to the weight of the evidence nor affected by abuse warranting reversal.

In their third proposition, Appellants assert in essence that it is inequitable to force the sale of the property on them subject to the first mortgage of Union when Appellants purchased the property thinking the property to be free and clear of other encumberances.

Appellants assert hereunder that they were told by an agent of Western that a purchase of the property at sale would be free and clear of incumbrances. The Trial Court specifically found "[t]he evidentiary material submitted did not support (Appelants) allegation, and did not support the allegation of any type of fraudulent or inequitable conduct on the part of (Western) that induced (Appellants) to make the subject matter bid." We go no farther than to say that we believe the property was properly sold in satisfaction of Western's second mortgage subject to the valid first mortgage of Union. See also, Sherman v. Gens and Barall Inv. Co., 172 Okl. 618, 46 P.2d 491 (1935).

No reversible error of law appears and the findings of fact by the Trial Court are supported by sufficient evidence. The order of the Trial Court is therefore AFFIRMED. Rule 1,202(b), 31 Rules of Appellate Procedure, 12 0.S. 1983 Sup., Ch. 15, App 2

HANSEN, P.J. and REYNOLDS, J. concur.

(Filed on May 26, 1987)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

WESTERN NATIONAL BANK OF TULSA, a National Banking Association,	)	
Plaintiff,	)	Case No. CJ-86-07721
vs	)	
PHILLIP WAYNE REED, a single man; UNION NATIONAL BANK OF LITTLE ROCK, a National Banking Association; and PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, an Oklahoma Professional Corporation,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

THIS cause coming on for hearing this 13th day of April, 1987, pursuant to Plaintiff's Motion for Summary Judgment sustained herein; before the undersigned Judge of the District Court; Plaintiff appearing by and through its attorney of record, Julie Thomas Rowland; Defendant Union National Bank of Little Rock appearing by and through its attorney of record, Lisa K. Thompson; Defendants, Philip Wayne Reed and Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma Corporation, having been duly served with summons and notice of this hearing, wholly failed to appear. Said Defendants are therefore in default and barred, restrained and enjoined from claiming any right, title or

interest in and to the subject properly. The Court, having examined the pleadings and the evidence offered therein, and in consideration thereof finds as follows:

1. All of the allegations of the Plaintiff's Motion for Summary Judgment are true and Western is entitled to judgment against Philip Wayne Reed in the amount of Forty-Two Thousand Three Hundred Forty-Three Dollars 89/100 ($42,343.89) together with interest accruing thereon at the rate of Fourteen Dollars 21/100 ($14.21) per diem from May 5, 1987 until paid in full, plus all accruing costs of this action, including attorney's fees, with interest upon all of said sums from the date of judgment until paid.

2. Western has a valid second lien on the real estate and improvements described in its Petition by virtue of the mortgage therein described, to secure payment of the indebtedness. Said real estate is described as follows:

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridan, according to the United States Government survey thereof.

3. Union National Bank of Little Rock has a valid first and prior lien on the real estate and improvements described above by virtue of a mortgage dated January 28, 1977 and filed of record January 28, 1977 in Book 4248 at Page 1885 and subsequently assigned to Union National Bank of Little Rock January 12, 1981 and filed of record of the Tulsa County Clerk, Tulsa County, State of Oklahoma. Said mortgage interest is superior to that of Western.

4. Western elects to have the real estate and improvements hereinabove described foreclosed and sold, subject to the first mortgage of Union National Bank of Little Rock, with appraisement, and such election is hereby approved and said sale shall be with appraisement.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED, by this Court as follows:

5. Western have and recover of and from the Defendant, Philip Wayne Reed, a judgment in the amount of Forty-Two Thousand

Three Hundred Forty-Three Dollars 89/100 ($42,343.89), together with interest accruing thereon at the rate of Fourteen Dollars 21/100 ($14.21) per diem from May 5, 1987, until paid, plus attorney's fees in the amount of One Thousand Five Hundred Dollars ($1,500.00), plus the continued costs of this action, for all of which let execution issue.

6. Western has a second mortgage lien on the real estate and improvements, the legal description of which is

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridian, according to the United States Government survey thereof.

It is hereby adjudged and established to be a good and valid lien upon said real estate and improvements, the judgment indebtedness of Western being secured by said lien.

7. Union National Bank has a first and prior mortgage lien on the real estate and improvements described above and it is hereby adjudged and established to be a good and valid lien upon said real estate and improvements, the mortgage indebtedness of Union National Bank being secured by said lien.

8. Upon the failure of the Defendant Philip Wayne Reed, to satisfy all of the judgments described above, the Sheriff of Tulsa County, Oklahoma, shall levy upon the above-described real estate and improvements, and after having the same appraised as provided by law, shall proceed to advertise and sell the same according to law, subject to the first mortgage of Union National Bank of Little Rock, and shall immediately turn over the proceeds thereof to the District Court Clerk who shall apply the proceeds arising from said sale as follows:

a. In payment of the costs of this action;

b. In payment to Western National Bank of its judgment as hereinabove setforth; and

c. The residue, if any, shall be deposited with the Clerk of the Court to await further order of this Court.

9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof.

10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and improvements to the purchaser, who shall convey all the right, title, interest, estate, and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall place said purchaser in full and complete possession and enjoyment of said real property and improvements.

_____

JUDGE OF THE DISTRICT COURT

Approved as to Form and Content:

_____

Julie Thomas Rowland, OBA #11497
Zarbano, Bridger-Riley, P.C.
400 South Boston, Suite LL
Tulsa, Oklahoma 74103
(918) 587-2766
Attorney for Western National Bank

_____

Lisa K.Thompson
Wilson & Associates
750 Union National Plaza
Little Rock, Arkansas 72201
Attorney for Union National Bank

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of May, 1987, a true and correct copy of the above and foregoing Journal Entry of Judgment was mailed in the United States Mail with proper postage thereon fully prepaid to the following:

Lisa K. Thompson
Wilson & Associates
750 Union National Plaza
Little Rock, Arkansas 72201
Attorneys for Defendant Union National Bank

Philip Wayne Reed
8723 Winding Road
Fort Worth, Texas 96112

Pray, Walker, Jackman, Williamson & Marlar
c/o Donald Pray
900 OneOK
Tulsa, Oklahoma 74103

_____
Julie Thomas Rowland

(Filed on August 29, 1987)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

UNION NATIONAL BANK OF LITTLE ROCK,	)	
	)	
Plaintiff,	)	
	)	Case No.
	)	CJ 874317
vs.	)	
	)	
PHILIP WAYNE REED,	)	
WESTERN NATIONAL BANK OF TULSA,	)	
PRAY, WALKER, JACKMAN, WILLIAMSON &	)	
MARLAR, and ANTOINETTE LYNN REED,	)	
	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

NOW ON THIS 29th day of August, 1987, there comes on for hearing the foregoing case before the undersigned Judge, the Plaintiff appearing by its attorneys, William D. Hunt & Associates - P.C., the Plaintiff, having previously dismissed JOHN DOE RESIDENT and JANE DOE RESIDENT, and JANE DOE REED, from this action, and it appearing to this Court that this is an action upon a Promissory Note and for foreclosure of a Mortgage upon real estate securing the same, which said real estate is located in the County of Tulsa, State of Oklahoma.

It appearing to the Court that the Defendants, PHILIP WAYNE REED, and ANTOINETTE LYNN REED, and each of them, were duly served, and have not answered either in person or by attorney, and each having been three times call in open court to appear or answer, came not, but made default. Therefore PHILIP

WAYNE REED, ANTOINETTE LYNN REED, and each of them are adjudged to be in default.

The Court further finds from the Affidavit filed herein that none of the Defendants named herein, are engaged in the military service of the United States within the meaning of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended; and this cause is hereby ordered to proceed to trial.

Thereupon the case came on for trial and being triable to the Court without the intervention of a jury, the Court proceeded to examine the pleadings, the note and mortgage being sued upon herein, which instruments were introduced into evidence, the testimony of witnesses duly sworn, and there being no necessity for pretrial conference, and upon being fully advised, finds that all of the allegations and averments of Plaintiff's Petition are true and the Court finds that it has jurisdiction over the parties and the subject matter of this action and the Court having heard the arguments of counsel and being well and truly advised finds:

That the Plaintiff, UNION NATIONAL BANK OF LITTLE ROCK, should have and recover judgment on its note and mortgage sued upon herein for the sum of $54,546.05, plus interest to July 17, 1987, in the sum of $2,738.84 and thereafter at the rate of 8.00% per annum until paid; attorney's fees of $5,455.00; $219.00 for abstracting; all advances for taxes and hazard insurance; $113.00 and all further costs for service of process; $60.00 and all further costs of preserving and maintaining the property; $80. 33 and all other late charges due under said Note and Mortgage; and the court costs herein under the Note and Mortgage of Plaintiff sued on herein, and that it owns a good and valid first mortgage lien upon the following described property situated in TULSA County, Oklahoma, to-wit:

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridan,
>
> an addition to the City of Broken Arrow, TULSA County, State of Oklahoma, according to the U.S. Government Survey thereof.

Plaintiff's mortgage lien is superior to the claims of all Defendants, said Mortgage having been recorded in the office of the County Clerk of TULSA County, Oklahoma, on January 28, 1977, in Book 4248 at Page 1885, and assigned to Plaintiff as alleged in said Petition.

That default occurred under said Note and Mortgage as alleged in said Petition and Plaintiff as owner and holder of said Note and Mortgage is entitled to judgment as aforesaid.

That the Defendant, WESTERN NATIONAL BANK OF TULSA, a corporation, has a valid mortgage lien on the above described property junior and inferior to the rights of Plaintiff, and said mortgage is recorded in Book 4856, at Page 2028 in the records of TULSA County Clerk.

The Defendant, WESTERN NATIONAL BANK OF TULSA, has a valid lien on the property pursuant to a judgment in Tulsa County District Court Case CJ 86-7721 styled WESTERN NATIONAL BANK OF TULSA v. PHILIP WAYNE REED, UNION NATIONAL BANK OF LITTLE ROCK, and PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR - P.C.; said judgment lien is in the sum of $42,343.89; plus attorney's fees of $1,500.00 and costs; and is recorded in Book 5009, at Page 2500 in the records of Tulsa County Clerk; said judgment lien is junior and inferior to Plaintiff's mortgage lien on said property.

That the Defendant, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, a corporation, has valid mortgage lien on the above described property junior and inferior to the rights of Plaintiff, and said mortgage is recorded in Book 4968 at Page 1885 in the records of TULSA County Clerk.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiff, UNION NATIONAL BANK OF LITTLE ROCK, a national banking corporation, have joint and several judgment against the Defendants, PHILIP WAYNE REED and ANTOINETTE LYNN REED for the amount due and owing under the above described Note and Mortgage in the sum of $54,546.07; plus interest in July 17, 1987, in the sum of $2,738.84 and thereafter at the rate of 8.00% per annum until paid; attorney's fee of $5,455.00; $219.00 for abstracting; all advances for taxes and hazard insurance; $113.00 and all further costs for service of process; $60.00 and all further

costs of preserving and maintaining the property; $80.33 and all other late charges due under said Note and Mortgage; and the court costs herein under the Note and Mortgage of Plaintiff sued on herein; and that it owns a good and valid first mortgage lien; plus all costs of this action both accrued and accruing; this judgment is to be in personam.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the liens and claims of the parties to this action, beginning with the lien on the property which is senior and superior to all of the remaining liens and claims are as follows:

1. Mortgage lien of Plaintiff as above described.

2. Second mortgage lien and judgment lien of Defendant, WESTERN NATIONAL BANK OF TULSA.

3. Third mortgage lien of Defendant, PRAY, WALKER, JACKMAN WILLIAMSON & MARLAR

It further appears that Plaintiff's Mortgage herein sued upon provides that appraisement of said premises is waived or not waived at the option of mortgagee and the Court finds that the Plaintiff has stated in open court its election under the terms of said Note and Mortgage to have said real estate sold with appraisement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Mortgage of said Plaintiff, as above described, be, and the same is hereby foreclosed and said premises is hereby ordered to be sold to satisfy judgment herein; that a special execution and order of sale and foreclosure shall issue commanding the sheriff to levy upon the above described real estate, and after having the same appraised as provided by law, shall proceed to advertise and sell the same as provided by law, and apply the proceeds from said sale as follows:

FIRST To the payment of costs of said sale and court costs herein.

SECOND To the payment of the amount due Plaintiff, together with interest, attorney fees, abstracting

expenses, and all other costs as per the judgment above entered.

THIRD The remainder, if any there be, as the Court may direct.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that from and after the sale of said real estate under and by virtue of this judgment and decree that the Defendants, and each of them, and all persons claiming under them or any of them, and they are hereby forever barred and foreclosed of and from any all right, title or interest, estate or equity in and to said real estate or any part thereof.

s/ _____
JUDGE OF THE DISTRICT COURT

APPROVAL AS TO FORM:

WILLIAM D. HUNT & ASSOCIATES - P.C.

By: s/ _____
Richard Davis,Jr
Attorney for Plaintiff

APPENDIX B

12 O.S. Section 2013

COUNTERCLAIM AND CROSS-CLAIM

A. COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

1. At the time the action was commenced the claim was the subject of another pending action; or

2. The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim pursuant to this section.

B. PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

12 O.S. Section 762

LIEN RESTRICTED TO PROPERTY LEVIED ON WHEN TWO-THIRDS OF APPRAISED VALUE SUFFICIENT TO SATISFY JUDGMENT — AMOUNT FOR WHICH PROPERTY SOLD — SALE FOR DEBT OR TAXES DUE STATE

If, upon such return, as aforesaid, it appears, by the inquisition, that two-thirds (2/3) of the appraised value of said lands and tenements, so levied upon is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no such property shall be sold for less than two-thirds (2/3) of the value returned in the inquest; and nothing in this section contained shall, in any wise, extend to affect the sale of lands by the state, but all lands, the property of individuals indebted to the state for any debt or taxes, or in any other manner, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws in such cases made and provided.

12 O.S. Section 764

RETURN OF APPRAISEMENT—SALE

A. Lands and tenements taken on execution shall not be sold unless the party causing the execution to be issued:

1. causes a written notice of sale executed by the sheriff containing the legal description of the property to be sold and stating the date, time, and place where the property will be sold to be mailed, by first class mail, postage prepaid, to the judgment debtor, any holder of interest of record in the property to be sold whose interest is sought to be extinguished, and all other persons of whom the party causing the execution to be issued has notice who claim a lien or any interest in the property whose interest is sought to be extinguished, at least ten (10) days prior to the date of the sale, if the names and addresses of such persons are known.

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-446

In The

Supreme Court of the United States

October Term, 1990

W.R. BENINTENDI and DELORES BENINTENDI,

Petitioners,

vs.

UNION NATIONAL BANK OF LITTLE ROCK, PHILIP WAYNE REED, WESTERN NATIONAL BANK, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, and ANTOINETTE LYNN REED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JULIE THOMAS ROWLAND
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(918) 742-2383

Attorney for Respondent,
Western National Bank of Tulsa

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Supreme Court has jurisdiction to hear this matter when no Federal question was ever raised at the lower Court level.

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No. 90-446

In The

Supreme Court of the United States

October Term, 1990

W.R. BENINTENDI and DELORES BENINTENDI,

Petitioners,

vs.

UNION NATIONAL BANK OF LITTLE ROCK, PHILIP WAYNE REED, WESTERN NATIONAL BANK, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, and ANTOINETTE LYNN REED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The Petitioners cite 28 U.S.C.S. §2101 as the basis for conferring jurisdiction upon this Court to review the Oklahoma Court of Appeals decision. This statute does not address jurisdiction. This statute addresses the time constraints for filing a petition for writ of certiorari.

Title 28 U.S.C.S. §1257 confers jurisdiction upon the Supreme Court to review final judgments rendered by the highest court of a State in specific circumstances. (e.g.

when the validity of a treaty or statute is in question, when the validity of a state statute is challenged as unconstitutional, or where some right, title, privilege or immunity is specially set up or claimed under the Constitution.)

In the instant case, the Supreme Court does not have jurisdiction to hear this Petition for Certiorari. Petitioners are not questioning the validity of a treaty or statute, nor the Constitutionality of a state statute. Petitioners are attempting to appeal the application of state laws. Petitioners have failed to assert a Constitutional claim at any previous level of these proceedings. For these reasons, the Petition for Writ of Certiorari must be denied.

STATEMENT OF THE CASE

In 1977, Philip Wayne Reed ("Reed") executed a first mortgage on residential real property to Union National Bank of Little Rock's ("Union") predecessor in interest. In 1985, Reed executed a second mortgage to Western National Bank of Tulsa ("Western"). In 1986, Reed defaulted on his payments to Western and Western filed a Petition to Foreclose its second mortgage, naming Union as a defendant. (Designation of Record on Appeal to the Supreme Court of the State of Oklahoma, Pages 1-5, hereinafter referred to as "R"). Union answered, asserting the superiority of its first mortgage but reserving the right to amend or further plead at any future time. (R. 15-16).

In February of 1987, Western filed its Motion for Summary Judgment seeking foreclosure of its mortgage and sale of the property, *subject to* the first mortgage held

by Union. (R. 17-18). Western's motion was sustained and on May 26, 1987, Western filed a Journal Entry of Judgment (R. 25-28) executed by counsel for Union and Western. (Defendants, Philip Wayne Reed and Pray, Walker, Jackman, Williamson & Marlar, never entered appearances, or answered, and were adjudged to be in default.)

The Journal Entry of Judgment stated that Union had a first and prior lien (R. 26, Paragraph 3) and that Western possessed a valid second mortgage (R. 26, Paragraph 2). The Journal Entry also stated that after the sale, all parties to the lawsuit would be barred from asserting any further interest in the property (R. 29, Paragraph 9) which failed to reiterate the provision that Union maintained a first mortgage. Contrary to Petitioners' assertions in their Statement of the Case, this scrivener's error, which was later corrected by oral application for order nunc pro tunc, never affected Petitioners. They testified, under oath, that they did not have access to the Court file, and Journal Entry, prior to the Sheriff's Sale. (R. 145, Paragraph 14, Lines 17-25, and Paragraph 15, Line 1). On July 6, 1987, Union filed its foreclosure petition. (R. 156-168).

An Alias Special Execution and Order of Sale with Appraisement was issued by the Tulsa County Court Clerk on July 13, 1987, stating that the property was to be sold *subject to* the first mortgage. The Sheriff's Sale was set for August 25, 1987 (R. 44). Notice was published, pursuant to statute, in a local paper, stating that the property was to be sold, *subject to a first mortgage totalling $57,207.88 as of July 1, 1987.* (R. 38-A).

On August 26, 1987, Union filed its Journal Entry of Judgment (R. 187-189). The Sheriff's Sale on Union's foreclosure was set on October 29, 1987.

On September 10, 1987, Western filed its Motion to Confirm Sheriff's Sale (R. 50). Notice was sent September 11, 1987 to counsel for Union, Philip Wayne Reed, and Pray, Walker, Jackman, Williamson & Marlar (R. 54). Contrary to Petitioners' assertion in their Statement of the Case, notice of the confirmation hearing was mailed to Petitioners on September 21, 1987. (R. 67).

Petitioners filed a Motion to Set Aside and Vacate Sheriff's Sale, a Brief, and an Amended Motion to Set Aside and Vacate Sheriff's Sale. (R. 58-66). In neither the Motion, the Brief, nor the Amended Motion did Petitioners assert a constitutional issue. Instead, they urged the trial court to set aside the sale on the basis of equity. After two days of hearings (R. 145, Transcript of Proceedings before Judge Daniel Boudreau, October 23, 1987 and October 28, 1987) the trial court confirmed Western's Sheriff's Sale (R. 80-81) on October 28, 1987 and denied Petitioners' Motion to Set Aside and Vacate Sheriff's Sale.

Union's Sheriff Sale was held October 29, 1987, at which time Union bid in its judgment and was the successful bidder. The sale was confirmed and Sheriff's Deed issued. On November 6, 1987, Petitioners filed a Motion for New Trial (R. 83-85). This Motion wholly failed to raise any Constitutional issues. On December 21, 1987, Petitioners filed an Amended Motion for New Trial (R. 104-107) asserting alleged procedural errors. After a hearing on the record, (R. 145) the trial court overruled Petitioner's Motion for New Trial.

On September 19, 1988, Petitioners filed their Appeal with the Supreme Court of the State of Oklahoma. As the basis for their appeal, Petitioners asserted procedural error, material damage to the property and equitable considerations. (Brief of Appellants In the Supreme Court of the State of Oklahoma, No. 70-355, September 19, 1988, Appendix A). On or about November 14, 1988, Petitioners filed their Reply Brief, reasserting the same grounds set forth in their original Brief. (Appellants' Reply Brief, In the Supreme Court of the State of Oklahoma, No. 70-354, Appendix B). The case was subsequently assigned to the Oklahoma Court of Appeals, which rendered its opinion December 19, 1989, affirming the trial court. (Memorandum Opinion of the Oklahoma Court of Appeals, Appendix C).

On or about January 4, 1990, Petitioners filed their Brief in Support of Petition for Rehearing, reasserting their original equitable and procedural arguments as the basis for rehearing. (Appellants' Brief in Support of Petition for Rehearing, January 4, 1990, Appendix D). On February 5, 1990, the Oklahoma Court of Appeals denied Petitioner's Petition for Rehearing. (Order of the Oklahoma Court of Appeals, February 1, 1990, Appendix E).

On or about February 23, 1990, Petitioners filed their Petition for Certiorari with the Supreme Court of the State of Oklahoma. (Petition for Certiorari, to the Supreme Court of the State of Oklahoma, February 23, 1990, Appendix F). In their Petition for Certiorari, the Petitioners urge the State Supreme Court to review the Appellate Court decision because of alleged errors by the Appellate Court in interpreting and applying state statutes.

On May 8, 1990, the Oklahoma Supreme Court unanimously denied Petition for Certiorari. (Order of the Supreme Court of the State of Oklahoma, May 8, 1990, Appendix G).

REASONS WHY THE PETITION SHOULD BE DENIED

The facts of this case fail to establish a substantial federal question that should be decided by this Court. Petitioners are seeking review of a state court's interpretation and application of state statutes. Petitioners are not asserting the unconstitutionality of these statutes. The fact that Petitioners have wholly failed to raise a Constitutional issue previously precludes their assertion of these issues in a Petition for Writ of Certiorari.

ARGUMENT

I. The Petition for Certiorari Raises Issues not Presented nor Considered by the Courts Below.

The assertion by Petitioners that the application of state law by state courts of Oklahoma deprive the Petitioners of their property without due process of law in violation of the 5th and 14th Amendments is totally groundless. Petitioners have never, at any stage in the proceedings, asserted that they were deprived of their property without due process.

Title 28 U.S.C.S. §1257 conveys jurisdiction upon this court to review final judgments rendered by a state court.

> Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, or the treaties or statutes of, or any commission held or authority exercised under the United States.

Although Petitioners fail to cite this statute as the basis for conferring jurisdiction upon this Court, it appears that they are proceeding under its auspices when they claim the Oklahoma Court of Appeals decision deprived them of their property without due process, as guaranteed them under the constitution. (Petition for Writ of Certiorari. Page 15). Unfortunately, Petitioners have failed to set up the federal title, right, privilege, or exemption previously and as a result, this Court has no jurisdiction to hear this matter. *Union Mutual Life Insurance Company v. Kirchoff*, 169 U.S. 103 (1898); *Keokuk & Hamilton Bridge Company v. Illinois*, 175 U.S. 626 (1900).

In the more recent case of *Webb v. Webb*, 451 U.S. 493 (1981), the court granted the petition for certiorari based upon Petitioner's assertion that she had raised the federal question at the lower court level. When it became apparent upon review of the record that Petitioner had not raised a Constitutional claim at the lower court level, the Court dismissed the Writ for lack of jurisdiction. Justice White, writing for the Court, set out the threshold jurisdiction analysis:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. §1257. As applied to the circumstances of this case, that statute requires that *in the state courts Petitioner have "specifically set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this Court enforce.* 28 U.S.C. §1257(3). Similarly our Rule 21.1(h) requires the Petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." (emphasis added).

Webb, supra, P. 495.

In the instant case, Petitioners have expressly omitted any reference to the record from the lower court, or any reference to Rule 14(h), [formerly Rule 21(h)] in their Brief in Support of Petition for Writ of Certiorari. None of the Petitioners pleadings (R. 1-269) or appellate briefs (Appendices A, B, D and F) raise 5th or 14th Amendment issues. Petitioners failed to raise any Constitutional right or privilege until they filed their Petition for Certiorari. The court's policy, first set out in *Cardinale v. Louisiana,* 394 U.S. 437, 438, is that *"[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."* (citations omitted) (emphasis added). *Webb, supra,* P. 499; *See also, Board of Dirs. of Rotary Int'l. v. Rotary Club,* 481 U.S. 537 (1987). The policy reasons for this rule are clear, as set forth in *Webb*:

> In the first place, although the States are sovereign entities, they are bound along with their

> officials, including their judges, by the constitution and the federal statutory law. Principles of comity in our federal system require that state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements . . . (citations omitted) There are also very practical reasons for insisting that federal issues be presented first to the state court system. *The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth* . . . Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter. (emphasis added).

Webb, supra, 498-499.

This rule has been passed on and upheld in several cases since *Webb,* including *Bankers Life & Casualty Company v. Crenshaw,* 486 U.S. 71 (1987), [where, at the lower court level, appellant life insurance company failed to refer to the 8th Amendment, the federal constitution or federal law;] *Heath v. Alabama,* 474 U.S. 82 (1985), [where petitioner failed to claim Alabama's lack of jurisdiction at the lower court level;] and *Board of Dirs. of Rotary Int'l. v.*

Rotary Club, 481 U.S. 537 (1987), [where, in their Petition for Certiorari, Appellants for the first time alleged a California statute was unconstitutionally vague or overbroad.]

In their brief in support of the Petition for Writ of Certiorari, Petitioners tacitly admit they have failed to raise a Constitutional issue when they argue:

> "Furthermore, it has been held that the Supreme Court of the United States will make a constitutional inquiry even though specific reference to constitutional violations does not appear before the court below if it sufficiently appears by a clear and necessary intendment that a federal question was presented." (Petitioners Brief in Support of Petition for Writ of Certiorari, P. 16).

In support thereof, Petitioners cite *Furman v. Nichol*, 75 U.S. (8 Wall.) 44 (1869); *Steins v. Franklin County*, 81 U.S. (14 Wall.) 15 (1872); *Kaukauna Water Power Co. v. Green Bay & Canal Co.*, 142 U.S. 254 (1891). These cases are cited out of context. The applicable holding, in each of these cases, regarding jurisdiction, was:

> If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, *and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand*, then the jurisdiction of this court attaches. (emphasis added).

Furman, supra, P. 57; *see, also, Steins v. Franklin County*, at P. 21; *Kaukauna County v. Green Bay & C. Canal*, at P. 269. These cases, and the rule that they promulgate, are distinguishable from the case at bar. Here, the Petitioner failed to alleged a federal question at either the trial court level

or the appellate level. However, neither the trial court nor the appellate court were forced to consider this constitutional issue in reaching their conclusions. This case has always been a question of, first the trial court, and later the Oklahoma appellate courts, applying and interpreting *state* law. Petitioners have failed to allege a federal right or privilege at the lower court level, as is apparent from the record. Furthermore, the lower courts were not forced to implicitly consider constitutional issues in reaching their decisions. For this reason, the Petition for Writ of Certiorari must fail, since the Supreme Court has no jurisdiction to hear this matter.

II. The Supreme Court has No Authority to Review State Determinations of Purely State Law.

In the instant case, Petitioners are not questioning the Constitutionality of the Oklahoma statutes and case law. They are unhappy with the *application* of the Oklahoma statutes and case law by the Oklahoma courts. "By an erroneous and convoluted *application* of Oklahoma case and statutory law, the petitioners have been deprived of $32,000.00 in cash to purchase what is in effect a void interest in property." (emphasis added). (Petitioners' Brief in Support of Petition for Writ of Certiorari, P. 16, "Reasons for Granting Writ".) The record (R. 1-269) amply demonstrates that this case is merely the consolidation of two mortgage foreclosure cases and the only issues raised on appeal to the lower courts were questions of procedure, damage to the property, and equity. The first case, filed by Western, was brought to foreclose a second mortgage. The Union case was brought subsequently, and separately, to foreclose a first mortgage. The

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trial court correctly applied state law in making its decisions. The trial court correctly applied and interpreted *state* law when it determined that the Sheriff's Sales resulting from both cases should be confirmed.[1] The trial court applied and interpreted *state* law when it determined that Union's claim against Reed was a permissive counter-claim under Oklahoma's procedure statute.[2] The trial court applied and interpreted *state* law when it determined the Journal Entry of Judgment in Western's case was properly amended by oral application for order nunc pro tunc.[3] The trial court interpreted and applied *state* law when it determined the sale price in Western's foreclosure was for more than the statutorily[4] required two-thirds of the appraised value. The trial court heard factual evidence which, in the court's determination, failed to support a claim of material damage, under Oklahoma law, sufficient to vacate the Sheriff's Sale. Most

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[1] 12 O.S. §765. If the court, after having carefully examined the proceedings of the officer, is satisfied that the sale has, in all respects, been made in conformity with the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale and shall order that the officer make to the purchaser a deed for such lands and tenements;

[2] 12 O.S. §2013(B)(1). A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

[3] *Application of Oklahoma Natural Gas Company*, 715 P.2d 477 (Okla. 1985).

[4] 12 O.S. §762(B) – in pertinent part: [B]ut no such property shall be sold for less than two-thirds of the value returned in the inquest . . .

importantly, the trial court, in applying *Oklahoma* law,[5] held that it would not assist Petitioners in extricating themselves from circumstances they created themselves. Petitioners object to each of these determinations on the basis that they were not made in accord with Oklahoma statutes and that the application of these statutes and case law was not equitable. The Oklahoma Court of Appeals affirmed the trial court's interpretation and application of state law.

The Supreme Court has "no authority to review state determinations of purely state law." *Int'l. Ass'n. of Longshoremen, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1985). In the case of *Herb v. Pitcairn*, 325 U.S. 117 (1944), the Court held:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (Citations omitted). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.* And our power is to correct wrong judgments not revise opinions. (emphasis added).

Pitcairn, supra, 115-16.

As this Court has stated in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1979), "[T]his Court

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[5] *State ex rel Burk v. Oklahoma City*, 522 P.2d 612 (Okla. 1973).

accords respectful consideration and great weight to the views of the state's highest Court on matters of state law, *Indiana ex rel, Anderson v. Brand*, 303 U.S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances'." there are no "exceptional circumstances" in this case. The trial and appellate courts of Oklahoma have interpreted and applied Oklahoma law. The petitioners are simply unhappy with these decisions.

There is no need to "correct" the Oklahoma Court of Appeals decision because it did not adjudge any federal rights. The Supreme Court should refuse to grant Petitioners' Writ of Certiorari. The lower courts merely interpreted and applied Oklahoma law. This fact alone does not confer jurisdiction on the Supreme Court to review such decisions.

CONCLUSION

Petitioners have failed to properly invoke the jurisdiction of this court, pursuant to 28 U.S.C.S. §1257. They have failed to raise, at any prior state of these proceedings, a claim that they were deprived of their property without due process of law. Petitioners have attacked these proceedings on procedural and equitable grounds as shown by the record, but they have failed to persuade the trial court or appellate courts of the State of Oklahoma that there was some kind of reversible error. The lower courts have applied and interpreted state law, and now the Petitioners, having lost at every level of state

court proceeding, are attempting a frivolous and groundless appeal to the nation's highest Court. There is absolutely no jurisdictional basis for the filing of this Petition for Certiorari. As a result, this Court has no jurisdiction to hear this matter and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ZARBANO, BRIDGER-RILEY, LEONARD
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APPENDIX A

No. 70,355

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

W. R. BENINTENDI and
DELORES BENINTENDI,

Appellants,

VS.

UNION NATIONAL BANK of
Little Rock, PHILIP WYANE REED,
WESTERN NATIONAL BANK, PRAY
WALKER, JACKMAN, WILLIAMSON &
MARLAR, ANTONINETTE LYNN REED,

Appellees.

BRIEF OF APPELLANTS

AN APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY

YOUNG AND YOUNG
BY: JOHN M. YOUNG
OBA ID# 9967
P. O. BOX 1364
SAPULPA, OKLAHOMA 74067
(918) 224-3131

ATTORNEYS FOR APPELLANTS

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STATEMENT OF FACTS

This case involves the appeal of the trial court's rulings in two separate cases the first of which was filed by the second mortgage holder of a tract of residential property to foreclose on its mortgage. Later the first mortgage holder filed a second suit also seeking foreclosure. The mortgage foreclosure proceedings were fraught with procedural errors. The sheriff's sale of the foreclosure of the second mortgage was conducted first at which the appellants purchased the property under the understanding that they were purchasing the property free and clear of other claims (which was stated to be the case in the journal entry of judgment of the second mortgage [sic] holder's foreclosure suit). Thereafter the first

mortgage holder sold the property at a subsequent sheriff's sale and was itself the successful purchaser, thereby extinguishing the rights of the appellants. The appellants objected to the confirmation of both sales and, following hearing and extensive briefing before the trial court, the trial court overruled the objections to confirmation of both sales and attempted to correct some of the procedural errors by orders nunc pro tunc. From these adverse and erroneous rulings, the appellants perfected these appeals which have been consolidated by this Honorable Court into one case. The facts are somewhat tedious to relate, as they involve the near simultaneous progress of the two foreclosure cases.

On December 4, 1986 the Western National Bank of Tulsa filed case number CJ-86-7721 seeking foreclosure of residential real estate upon which it had a second mortgage executed by Phillip Wayne Reed. Joined as defendants were the Union National Bank of Little Rock, the first mortgage holder, and the law firm of Pray, Walker, Jackman, Williamson and Marlar, who had a third lien upon the property for legal services performed on behalf of Mr. Reed. The petition alleged a default in $36,390.98 in principal, together with the obligation to pay accrued interest, costs, and attorney fees. The defendant Union National Bank filed an answer consisting basically of a general denial with the reservation of a right to amend. It amended its answer on January 12, 1987, but still did not allege any default in the payment of the note secured by its first mortgage.

Western then filed a motion for summary judgment in CJ-86-7721 and the issues were reduced to judgment. Following hearing on April 13, 1987 in a journal entry of

judgment approved as to form and content by both the attorneys for the plaintiff, the Western National Bank and the first mortgage holder, The Union National Bank. The journal entry of judgment recited that the defendants Phillip Wayne Reed and the attorney firm of Pray, Walker, Jackman, Williamson, and Marlar were in default and were therefore, "barred, restrained, and enjoined from claiming any right, title, or interest in and to the subject property."

The journal entry of judgment ordered the foreclosure of the mortgage of Western upon the following described real property:

> The East Half of the South Three Hundred Twenty Feet (320) feet of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East, of the Indian Base and Meridian according to the United States Government survey thereof.

Omitted is any reference to the County and State of the property ordered to be sold.

The journal entry of judgment also contained the following provisions:

> "9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof."
>
> "10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and

> improvements to the purchaser, who shall convey all the right, title, interest, estate and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall place said purchaser in full and complete possession and enjoyment of said real property and improvements."

Particularly noteworthy of the April 13, 1987 journal entry of judgment in CJ-86-7721 is the complete omission of any ruling upon a mandatory counterclaim which must be asserted by any other defendant, in this case the Union National Bank which later claimed to have a defaulted second mortgage.

At any rate, on August 11, 1987 Western in CJ-86-7721 filed a notice of sheriff's sale and mailed a copy of the notice only to the defendants Union National Bank and Phillip Wayne Reed. Omitted was any mailing to Pray, Walker.

In the meantime, the Union National Bank on July 6, 1987 filed Tulsa County case number CJ-87-4317 wherein it sought the foreclosure of its first mortgage upon the same legal description contained in the journal entry of judgment in CJ-86-7721, but with the addition of the recitation that the property was "an addition in the City of Broken Arrow, Tulsa County, State of Oklahoma." Included as an additional defendant was Antoinette Lynn Reed. Originally included as defendants, but later on August 20, 1987 dismissed as defendants without prejudice, were Jane Doe Reed, John Doe Resident, and Jane

Doe Resident. Journal entry of judgment was entered in CJ-87-4317 on August 24, 1987 but filed on August 26, 1987. The CJ-87-4317 journal entry of judgment held that there were three valid liens and claims upon the property as follows: (1) the first mortgage lien of Union, (2) the second mortgage lien of Western, and (3) the third mortgage lien of Pray, Walker.

The day after the entry of the journal entry of judgment on August 24, 1987 in CJ-87-4317, a sheriff's sale was held in case number CJ-86-7721. Sheriff's appraisers in CJ-86-7721 appraised the property (again with an incomplete legal description) at $100,000.00. It was at the August 25, 1987 sheriff's sale in CJ-86-7721 that the appellants, W.R. Benintendi and Delores Benintendi purchased the property for a bid of $32,000.00. No reference was contained in the notice of the August 25, 1987 sheriff's sale of the attorney fees entered in favor of Union in the journal entry of judgment in case number CJ-87-4317 in the amount of $5,455.00 nor of $219.00 for abstracting, advances for taxes and hazard insurance of $113.00, all further costs for service of process, $60.00 for the cost of preserving and maintaining the property, $80.33 and all other late charges, court costs, etc. which was entered the previous day, but not filed of record until August 26, 1987. Details about the circumstances of the interest of the Benintendis in the property and their bid will follow.

Thereafter on September 10, 1987 the Union National Bank, the plaintiff in CJ-87-4317, filed an application for order nunc pro tunc to correct the journal entry of judgment in its case reflecting that the defendant Western National Bank and Pray, Walker were in default. Before the journal entry of judgment was modified, however, the

defendant Western National Bank in CJ-87-4317 filed a motion to vacate default judgment on September 21, 1987, although at that time they had not been defaulted. Thereafter on September 23, 1987 the court in CJ-87-4317 did file an order nunc pro tunc which corrected what was stated to be a scrivenor's error by holding that both Western and Pray, Walker were in default in CJ-87-4317. That motion was set twice but never ruled upon.

On September 10, 1987 the plaintiff in CJ-86-7721 filed a motion to confirm its sheriff's sale (finally stating that the property was situated in Tulsa County, Oklahoma) on September 11, 1987. According to the affidavit of mailing filed in CJ-86-7721 on September 22, 1987, notice of the hearing on the motion to confirm sale was mailed to Phillip Wayne Reed, the Union National Bank, and Pray, Walker, but no notice was stated to be mailed to the purchasers, the appellants herein, nor to Antoinette Lynn Reed who was a claimant in the property according to the pleadings in CJ-87-4317.

On September 15, 1987 Union filed in CJ-86-7721 a motion praying that the proceeds of the second mortgage foreclosure sale held on August 25, 1987 be paid to it since it had a superior first lien, although the prayer in this motion was contrary to the provisions of the journal entry of judgment which it had previously agreed to as to form and content.

The appellants by this time realized that this Honorable Court no doubt now also sees are some significant problems with the sheriff's sale procedure in the two related cases. They filed a motion to set aside and vacate

the August 25, 1987 sheriff's sale in CJ-86-7721 on September 24, 1987.

Shortly thereafter, Union in CJ-87-4317 filed its notice of sheriff's sale to be held on October 29, 1987. The sheriff's sale in CJ-87-4317 was then conducted on October 29, 1987 and the property, appraised in this case for $90,000.00, was sold to the plaintiff, Union National Bank, for $61,588.01. On October 29, 1987 a motion to confirm this sale was filed and mailed to all parties. The appellants, through their present counsel, filed a Motion to Intervene, Motion to Consolidate, and Objection to Confirmation of Sale on November 24, 1987. A supplement to the appellants' objections to confirmation of the sale was filed on December 21, 1987.

Following a hearing the court in CJ-86-7721 denied the appellants' motion to set aside and vacate the sheriff's sale and confirmed it on October 28, 1987. The appellants, however, through their present counsel timely filed a motion for new trial.

Following supplemental briefing by the parties of their respective positions on the issues of whether or not either or both of the sales should be confirmed and whether or not the cases should be consolidated, the motions and objections were all set for hearing before the same trial judge on December 21, 1987.

After taking his decision under advisement, the trial court on January 20, 1988 entered a minute order in the case. Without specifically ruling on the motions to consolidate, the court confirmed both sales and overruled all objections thereto filed by these appellants. The effect of the rulings was that the appellants' $32,000.00 purchase

price was paid to the second mortgage holder to purchase its interest which was shortly cancelled by the first mortgage holder's foreclosure sale.

Several factual issues were raised in two evidentiary hearings held in the cases on October 23, 1987 and on December 21, 1987. The first hearing, on October 23, 1987, was in CJ-86-7721 and was the hearing on the motion to confirm sale and the objections filed by the appellants thereto. One of the questions was what the appellants' understanding was regarding the existence of the first mortgage in bidding to buy the second mortgage, and what action, if any, by the plaintiff, the Western National Bank, prompted their actions. Prior to the foreclosure sales, the Benintendis through a realtor had attempted to purchase the property, but, because of the foreclosures, the efforts to purchase the property through a realtor never reached fruition. Because, however, a written offer was presented by the Benintendis (although it was not accepted), nevertheless, the mortgage holders were aware of their interest in the property. Mrs. Benintendi testified that she had a conversation with Steve Howe, an officer of the Western National Bank who advised her that an auction would be held to sell the property on August 25 at 10:00 a.m. Her statement concerning the content of the conversation appears at page 16 of the October 23 and 28, 1987 transcript as follows:

> "A: Well, he mentioned – first of all, he asked me how much are you planning to bid. Well, it just caught me off guard, and I didn't know what I was going to bid at a sale, you know. I just said that depends. I don't know. That depends, and I said how much are you going to bid, you know, I just – and he said, well, the first

> mortgage has to be satisfied, you know, as far as, you know, they would satisfy the first mortgage, but, you know, I just thought they was going to satisfy the first mortgage. I couldn't imagine them bidding so low to start with.
>
> Q: And it was your belief that they were going to take care of that first mortgage?
>
> A: Yes, yes, or that somehow they would just write some of it off. I didn't know. I ha[illegible] heard some incredible things of write offs today with foreclosures."

Following this conversation with Mr. Howe, Mrs. Benintendi did appear at the sheriff's sale. She testified at page 15 as follows:

> "Q: Did the sheriff, in announcing the sale, say that this property was being sold subject to a first mortgage?
>
> A: I didn't hear him say subject to. I heard him say there was a first mortgage on it, and evidently he did, but I wouldn't have known what it meant anyway.
>
> Q: When you bid the thirty-two thousand dollars, did you – was it your thought that that was the total purchase price of this piece of property?
>
> A: Yes, definitely yes."

No reference was made at the sheriff's sale as to any attorney fees which were in fact owed to the Union National Bank in the amount of $5,455.00 nor of any of the other miscellaneous costs totalling approximately $472.33 (October 23 and 28, 1987 transcript page 28).

On December 21, 1987 the court considered argument of counsel and the additional testimony from two witnesses in CJ-86-7721 and argument on the motion to confirm sheriff's sale and objections thereto in CJ-87-4317. Although the transcript contains the style of CJ-86-7721, the court stated that argument presented to the court on that day would be considered in both cases (December 21, 1987 transcript page 4). The first part of the transcript consists of argument before the court wherein the parties argued their respective legal positions through counsel. An additional factual issue was raised concerning certain damages to the premises that occurred after the sheriff's sale in CJ-86-7721 on August 25, 1987 and before the later hearing on the motion to confirm that sale. The legal argument submitted by the parties at this hearing is once again presented to this Honorable Court in the argument and authorities in the propositions following.

Additionally, the appellants called as a witness Mr. Richard Schauf who had been employed on his own as a carpenter for approximately 18 years and who was a personal friend of the appellants. He testified that he visited the property on approximately Labor Day weekend (page 33) and observed that blades had been taken off a fan and a fireplace screen was gone. He also observed an approximately 8' x 16' metal storage building made from what appeared to be the back of an insulated can with a roll-up door (pages 35-6).

Mr. Schauf also visited the property on approximately the 25th or 26th of September and identified as plaintiff's Exhibit "B-1" an estimate of certain damages which he also testified occurred to the property since his

previous visit to it on Labor Day weekend (page 37). Mr. Schauf valued the damages at pages 37 through 47 of over $10,000.00.

Mrs. Benintendi, one of the appellants, also testified at the hearing assisting to fix the dates and also testifying at page 64 that she would not have been willing to purchase the property at the August 25, 1987 sale had the extensive damage which existed on the premises at the time of confirmation of the sale existed at the time of the sale. In fact, she testified that the loss of the shed alone was enough to keep her from bidding at any sale (page 68).

Also important to note during the argument of counsel at the December 21, 1987 hearing was that the court agreed there was a mistake of fact in the Benintendis' purchase of the property (page 15) and that counsel for the Western National Bank acknowledged there was a "defect in the terminology of the journal entry." Counsel, however, contended it was merely a scrivener's error which should be corrected by an application nunc pro tunc (page 22). Counsel for the appellants pointed out to the court at page 26 that, if Mrs. Benintendi was mistaken as to the interest on which she was bidding and purchasing at the August 25, 1987 sale, the journal entry nevertheless stated exactly what Mrs. Benintendi thought the situation and terms of the purchase were (page 26).

The court stated at the outset of the hearing (page 6) that "if there was any way I could legally find for the Benintendis in this case, that I would do that." Nevertheless, although numerous errors in both proceedings were pointed out to the court, the court by minute order

entered on January 20, 1988 overruled the appellants' motion for new trial and confirmed the second sale of the property to the Union National Bank over the appellants' objections, thereby extinguishing the interest which they purchased at the first foreclosure sale for $32,000.00 in cash.

PROPOSITION I

THE PROCEEDINGS REDUCING THE ISSUES TO JUDGMENT AND THE EXECUTION SALES CONDUCTED PURSUANT TO SAID JUDGMENTS WERE IMPROPER AND NOT IN ACCORDANCE WITH LAW AND THE PURCHASES CONDUCTED THEREON SHOULD, THEREFORE, NOT BE CONFIRMED.

SUB-PROPOSITION A

THE SECOND CASE FILED, CJ-87-4317 WAS IMPROPERLY FILED AND DID NOT VEST THE COURT WITH JURISDICTION.

As was noted at the December 21, 1987 hearing, the Union National Bank in case number CJ-86-7721 filed an Amended Answer on January 12, 1987 which did not assert any counterclaim. However, it later, when it filed case number CJ-87-4317, filed a Petition alleging in paragraph 7 of its first cause of action that default was made by the Reeds in their note payments on January 1, 1987. It is clear, therefore, that at the time the amended answer was filed that a cause of action had arisen in the case against another opposing party. 12 O.S. Sec. 2013 (A) specifically provides that:

> "A pleading *shall* state as a counterclaim any claim which *at the time of serving the pleading* the pleader has against *any opposing party*, if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." [Emphasis added]

The Union National Bank contended before the trial court that there was a difference between the mortgages and the property. What was involved in both cases, however, was the title to the same property. It hardly makes sense in a suit involving title to property that every claim be resolved in a different suit. Obtaining judicial economy was the intent of the legislature in enacting Sec. 2013 and it is entitled to enforcement by the courts.

Furthermore, the official committee comment to Sec. 13 set forth below is helpful:

> "Subsections A, B, and E through H of Section 2013 are the same as subdivision 13(a), (b) and (e) through (h) of the Federal Rules of Civil Procedure. All claims that a defendant can assert against a plaintiff are called counterclaims, whether they arise out of the same transaction or occurrence or out of an unrelated transaction or occurrence. No distinction is made in Section 2013 between setoffs and other types of counterclaims.
>
> "Subsection A of Section 2013 changes Oklahoma law by *requiring* a defendant to assert *any claim* that he has against *any opposing party* that arises out of the transaction or occurrence that is the *subject matter* of the opposing party's claim. If a pleader fails to assert a compulsory counterclaim he cannot use it as the basis of an

> independent suit. Restatement (Second) of Judgments 22(2)(a) (1982). See *Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981) (second action enjoined), cert. denied 102 S.Ct. 2902 (1982); *Baker v. Southern Pac. Transp.*, 542 F.2d 1123 (9th Cir. 1976) (second action barred)." [Emphasis added]

Because the claim of the Union National Bank clearly existed against an opposing party (the Reeds) in the suit and was the same subject matter of the Western National Bank's suit, it could not be used as the basis of an independent suit. It was, therefore, error by the court to allow CJ-87-4317 to proceed piece-meal in different litigation without a complete adjudication of all issues in the first case filed. The proper procedure would have been for the court to vacate the judgments entered in both cases, to dismiss the second case filed, and to enter full relief by all parties in the first case filed.

Even counsel for both the Western National Bank and the Union National Bank were confused as to the status of the two cases and this confusion was never resolved by the trial court. In the earlier case, for example, Union filed a motion to have the money generated from the August 25, 1987 sheriff's sale distributed to it rather than to the plaintiff in the case, the Western National Bank. This motion was never ruled on by the court. Additionally, in the second case filed, CJ-87-4317, the motion to vacate default judgment filed on September 21, 1988, was actually filed two days before the court entered the order nunc pro tunc changing the original judgment to a default judgment. The motion to vacate default judgment was set for hearing twice by the court by two orders filed on October 1, 1987 and October 7, 1987. Nevertheless, this

motion also was never ruled on prior to the confirmation of the sale in the case.

The purpose of a confirmation of sale hearing is to insure that all of the proceedings reducing the issues to judgment and the sale proceedings were in all respects proper. In neither case was this true and the basis for the error was the confusion resulting from two cases being filed and simultaneously pursued covering the same tract of land. This is the very type of situation that the legislature sought to avoid by the enactment of the mandatory counterclaim provision in 12 O.S. Sec. 2013 (A). The most judicious alternative is for this Honorable Court to vacate both sales, order the case to be consolidated and a proper journal entry of judgment rendered upon all of the issues before the court. Then a single proper sale can be conducted.

SUB-PROPOSITION B

THE JOURNAL ENTRY OF JUDGMENT ENTERED IN CASE NUMBER CJ-86-7721 ACCORDED FULL RELIEF TO THE PARTIES.

Sub-Proposition A contains authority why all of the relief to be accorded in the cases should be granted in the first case filed. The court did enter in that case a Journal Entry of Judgment approved as to form *and content* by the attorneys for *both* the Western National Bank and the Union National Bank. That Journal Entry omitted any reference to the County and State of the property upon which judgment was intended to be entered.

Perhaps, however, the greatest anomaly in this case is that the Journal Entry of Judgment which was approved as to form and content by the attorneys and entered by the court contained the very recitation that the appellants have indicated from the beginning was their understanding of the effect of the sale. The appellants indicated their understanding was that their purchase of the property at the sale would buy the entire tract. This is *precisely* what the court ordered when it made the following judgment:

> "9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof."
>
> "10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and improvements to the purchaser, who shall convey all the right, title, interest, estate and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall place said purchaser in full and complete possession and enjoyment of said real property and improvements."

The Western National Bank later contended the error should be corrected by orders nunc pro tunc, and the court so ordered. However, to radically alter the trial court's judgment after there had been intervening parties

whose interests were predicated upon those provisions which were previously approved as to form and content by the banks involved was a gross abuse of discretion and reversible error. Especially inequitable was the trial court's correction of the errors of two sophisticated lending institutions and the refusal to correct what was unquestionably the mistake of the very *un*sophisticated appellants who knew nothing of the law. If there has been a mistake by anybody it has been by more [sic] one party and it is, therefore, a bilateral mistake which clearly justifies rejection of confirmation of the sale. As the case of *Oklahoma Natural Gas Company v. The Corp. Comm. of the State of Oklahoma*, 715 P2d 477 (Okla. 1985) at page 478 clearly states:

> "under the rule, the amendment or nunc pro tunc entry may *not* be made to supply a judicial ommission [sic] or to correct an error of the court or to show what the court might or should have decided or *intended* to decide, as distinguished from what it actually did decide. *Stevens Expert Cleaners & Dyers v. Stevens* 267 P2d 998 (Okla. 1954)." [Emphasis added]

Union and Western may regret the original journal entry of judgment in CJ-86-7721. However, if one party's mistakes on the merits are to be corrected, then all parties' mistakes should be corrected. If some are left *un*corrected, it is only fair to leave *all* uncorrected. In such case the original journal entry of judgment should be enforced in accordance with its terms which were to put the purchasers in full possession and enjoyment of the premises as the purchasers themselves thought would be the case. The purchasers' first request for relief before the trial court was that the sale in case number CJ-86-7721 not be

confirmed, but, since it was, then the court should be obligated to enforce its judgment placing these purchasers in full possession and enjoyment of the premises. If Union had wanted to foreclose on its mortgage, certainly by the date of the Journal Entry of Judgment on April 13, 1987, almost four months after the date of default, it could have urged this relief upon the court in CJ-86-7721. If there is a mistake in its not doing so, it is a *BILATERAL MISTAKE* made by *BOTH* of the plaintiffs in these two cases, and not just these purchasers who have little or no knowledge of the law!!!

SUB-PROPOSITION C

THE SALE PRICE IN CJ-86-7721 WAS FOR LESS THAN THE REQUIRED TWO-THIRDS OF THE APPRAISED VALUE.

12 O.S. 762 requires that all sales be made at a price at least two-thirds of the appraised value of the property. The record is clear that the appraisal in case number CJ-86-7721 was $100,000.00, but that the property sold for $32,000.00. Western sought to circumvent this requirement of law by contending that, since it was sold subject to a first mortgage, the total sale price exceeded two-thirds of the appraised value. This same argument was asserted before the Supreme Court of Kansas in *DeJarnett v. Verner*, 19 P 666, 40 Kan. 224 which specifically held "where two-thirds of the appraised value of real estate sold that sheriff's sale was $901.00, and there was a supposed mortgage on the property of $800.00, and the sheriff sold the property for the sum of only $101.00, but subject to such mortgage, he sold the property for less

than two-thirds of its appraised value." The court determined that sale to be a *nullity*. The Supreme Court of Oklahoma has also followed the rule that sales for less than two-thirds of the appraised value of the property are nullities, *Page v. Turk*, 43 Okl. 667, 143 P 1047 (1914). According to the original Journal Entry of Judgment in CJ-86-7721, the property was not sold subject to the first mortgage so the notice was improper in that respect. Even if it were subject to the first mortgage, the appraisers should properly have appraised the interest which was for sale, namely a subordinated interest in the property, not any property interest itself worth $100,000.00. To allow the sale for less than 2/3 of the appraised value misleads prospective purchasers that they are getting a better bargain than they actually are. The sale conducted on August 25, 1987 in CJ-86-7721 was, therefore, a nullity and this Honorable Court should so hold and vacate it.

SUB-PROPOSITION D

THE NOTICE OF SALE GIVEN IN CASE NUMBER CJ-86-7721 WAS DEFECTIVE.

The notice of sale in CJ-86-7721 was defective for several reasons. First, no notice of the sale was mailed to defendant Pray, Walker, as required by 12 O.S. 764 (1). Western's case, CJ-86-7721, found that Pray, Walker did not have an interest in the property at that time, but, magically, its interest was resurrected in the property several months later when the Journal Entry of Judgment was entered in case number CJ-87-4317. If Pray, Walker

did not have an interest at the time of the first sale, why did the trial court so determine in a later case?

Furthermore, the notice of sale in CJ-86-7721 omitted any reference to the attorney fees of $5,455.00 awarded to the Union National Bank attorneys and over $472 in various costs. For some unknown reason, this judgment was entered in CJ-87-4317 on the day *before* the sheriff's sale on August 25, 1987 in CJ-86-7721, but was not filed for public record until the day *after* the sale on August 26, 1987. It is true that 12 O.S. 764 does not *specifically* state the attorney fees and costs must be announced or advertised. It is clear, however, that the purpose of the notice of sale is to attract purchasers and to advise them of what is to sold. When the judgment creditor undertakes the responsibility, as it did in CJ-86-7721 to advise the purchaser of the terms of the first mortgage, it certainly assumes an obligation to state accurate and complete information. The purchasers were clearly misled by the failure of Western to state in its notice *complete* information about the existence or terms of the first mortgage. The attorney fees and miscellaneous costs which were awarded to Union of almost $6,000.00 is certainly a significant figure, especially when considered in conjunction with the damage to the property as set forth later in this brief.

SUB-PROPOSITION E

THE SALE IN CASE NUMBER CJ-87-7721 IS VOID FOR FAILURE TO RECORD THE JUDGMENT.

It is un-disputed that Western failed to record its judgment in the office of the County Clerk of Tulsa

County as required by 12 O.S. Sec. 706. Western contended before the trial court that it was not required to do so because the mortgage was a consensual lien. However, if the legislature had intended to except from the operation of its statute such "consensual" liens, it could certainly have done so. Union apparently agreed with the purchasers in this regard because it recorded its judgment which it obtained in case number CJ-87-4417. The failure to do so in case CJ-86-7721 is, therefore, fatal.

PROPOSITION II

MATERIAL DAMAGE TO THE PREMISES OCCURRED BETWEEN THE SALE IN CJ-86-7721 AND THE CONFIRMATION DATE AND THE SALE SHOULD THEREFORE NOT BE CONFIRMED.

The record was clear that the purchasers had carefully examined the premises prior to bidding at the sale. They were very specific about the condition of the premises at that time, particularly regarding the metal building. The appellants even engaged Mr. Richard Schauf, the contractor, to ensure that the home was sound. Western claimed that anyone could remove the building and it would not affect the sale in any manner. The appellants specifically intended to utilize the building for the storage of their equipment, and actually stored a tractor in the shed after the sale. The replacement cost of the building was approximately $8,000.00. If Western had not wanted the building to be included in the sale, it should have informed prospective purchasers in some manner rather than by allowing them to be tricked into thinking it was part of the sale. The other damages to the premises,

while individually not as significant as the loss of the metal building, were also cumulatively very material. Because of their many visits to the premises, the appellants and Mr. Schauf were also able to pin-point the dates of the vandalism to be within the period of time from the sale on August 25, 1987 to the date of the initial confirmation of the sale by the court. The purchasers are certainly entitled to raise questions pertaining to the sale at any time because the trial court had an independent duty under 12 O.S. Sec. 765 to insure that the sale was properly conducted whether any party raised any specific objection to the sale procedures or not.

Under such circumstances the law provides that the sale must be vacated:

> "A purchaser at a mortgage foreclosure sale may be relieved of his obligation where, after the date of the sale but before conveyance is made, the property is destroyed or materially damaged. Thus, where a building constituting a valuable and essential part of premises purchased at a forfeiture sale is destroyed by fire before the time for final payment of the price and delivery of the deed, the purchaser may be relieved of his obligation and recover his advance payments."
>
> 55 *Am Jur 2nd* Mortgages Sec. 846

PROPOSITION III

THIS HONORABLE COURT HAS AN AFFIRMATIVE DUTY TO APPLY EQUITABLE CONSIDERATIONS TO ITS DECISION WHICH MANDATES THE REVERSAL OF THE TRIAL COURT'S JUDGMENTS CONFIRMING THE SALES AND CORRECTING THE JUDGMENT IN CJ-86-7721.

The trial court indicated both to counsel in chambers and on the record its concern for the mistake by the purchasers in purchasing the property under the circumstances which they did. if the trial court's judgments are affirmed, the appellants will suffer the loss of their entire $32,000.00 cash purchase price. However, equity would probably not be served to Union if the court were to confirm the sale in case number CJ-86-7721 and strictly enforce the provisions of the Journal Entry of Judgment. 47 *Am Jur 2nd* Judicial Sales Sec. 175 specifically provides that equitable considerations may be considered by the court:

> "Also, objections may properly be taken to the confirmation of a sale on grounds that would make it *inequitable* to confirm the sale and exact compliance by the purchaser with his bid, as where he was *misled* and was induced to act at the sale on a material misrepresentation, even if innocent, in the notice or advertisement, or would not receive what he had bargained for, or where there has been a material change in the purchaser's circumstances."

47 *Am Jur 2nd* Judicial Sales Sec. 178 further provides that "[t]he court must act in the interest of *fairness* and prudence, and with a just regard to the rights of *all* concerned, and the stability of judicial sales." [Emphasis

added] The holdings of this Honorable Court are in accord with this rule that the trial court is entitled to examine into the equities of the parties and may, where there is a showing of unfairness, disception, impropriety, or other meritorious equitable grounds deny confirmation of the sale, *State of Oklahoma Ex rel Commissions of the Land Office v. Landess,* 293 P2nd 574 (1955) and *State Ex rel Commissioners of the Land Office v. Schneider,* 181 P2nd 975 (1947).

The trial court acknowledged the unfairness involved in the confirmation of the sale to the purchaser of the Western sale but refused to vacate the sale. The just principles of equity mandate the reversal of this grossly unfair result.

CONCLUSION

This Honorable court has an affirmative duty to apply equity in this case and has never hesitated to do so to avoid unfair results. The Western National Bank loaned money to the mortgagors, knowing that they would be in a subordinate mortgage position. Through the circumstances of the facts of this case, they have very deftly managed to extract $32,000.00 from these innocent purchasers who have no knowledge of the law attempting to purchase an interest in property which Western well knew would shortly be totally worthless without the expenditure of additional considerable sums of money. They now proclaim that the purchasers have made a unilateral mistake and must bear the consequences of their own ignorance. Yet when the mistakes of they themselves who are experienced mortgage lenders are pointed

out to the trial court, they hurriedly urge that their mistakes should be corrected by the court, but the mistakes of the purchasers should stand. Article II Sec. 6 of the Constitution of this State guarantees that:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

The courts of this state at all levels have never been hesitant to affirm this provision that there is a remedy for every wrong and for every injury. The innocent purchasers in this case have suffered a wrong. It is inequitable to require them to bear the brunt of their mistakes and to allow the plaintiffs who willingly and with full knowledge of the risk assumed their legal status as first and second mortgagees to escape the consequences of their mistakes.

Their own legal gerrymandering in the filing of two cases contrary to law are the very reasons why there are the large number of mistakes in these proceedings. Had the parties properly counterclaimed as required by law in the first case filed, probably none of the numerous errors appearing in these two cases would have occurred. Equity mandates that both the sales and the judgments be

vacated, that a proper Journal Entry of Judgments be entered the proper sales had thereon.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 15th day of September, 1988, I mailed a true and correct copy of the above and foregoing instrument with postage prepaid to:

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JOHN M. YOUNG

APPENDIX B

NO. 70,354

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

W.R. BENINTENDI and
DELORES BENINTENDI,

Appellants,

VS.

UNION NATIONAL BANK of
Little Rock, PHILIP WAYNE REED,
WESTERN NATIONAL BANK, PRAY
WALKER, JACKMAN, WILLIAMSON &
MARLAR, ANTOINETTE LYN REED,

Appellees.

APPELLANTS' REPLY BRIEF

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY

YOUNG AND YOUNG
BY: JOHN M. YOUNG
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ATTORNEYS FOR APPELLANTS

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PROPOSITION I

THE PROCEEDINGS REDUCING THE ISSUES TO JUDGMENT AND THE EXECUTION SALES CONDUCTED PURSUANT TO SAID JUDGMENTS WERE IMPROPER AND NOT IN ACCORDANCE WITH LAW AND THE PURCHASES CONDUCTED THEREON SHOULD, THEREFORE, NOT BE CONFIRMED.

The appellees argued that the trial court properly exercised its discretion in confirming the mortgage foreclosure sales and that those rulings should not be disturbed on appeal. Western conveniently cites for this court the provisions of 12 O.S. Sec. 765(b) which set the standard by which sales should be confirmed. It is not

necessary to once again cite the statute in toto. It will suffice to remind this Honorable Court that the statute requires that the sale must be in conformity with the provisions of the law in *all* respects. As was demonstrated in the appellants' brief in chief, there were many errors in the sale proceedings and in the journal entries of judgments upon which the sales were predicated.

The appellees contend that, absent an abuse of discretion, the trial court's ruling should not be disturbed on appeal. They further imply that, because the hearing on the motion to confirm sale was lengthy, that this must somehow be some indication that the court's discretion was not abused. Had the sales been properly conducted, no doubt the hearing to confirm them would have been short. Because the proceedings were so fraught with error, it took more time for the errors to be presented and certainly much more time for the appellees to argue in support of their actions. Additionally, much of the time was spent by the appellees themselves arguing that the court should "rescue" them from their "own folly" in what they now describe as a "scrivener's error" in the original journal entry of judgment entered in C-86-7721. For some unexplained reason, equity should protect the appellees, but should be blind to the errors of the appellants whose errors have cost them $32,000.00 which has now been totally lost. The case of *University of Tulsa v. Moores*, 177 Okl. 548, 61 P2d 25 (1936) noted that "each case must stand upon its own peculiar facts" and its determination of whether a judicial sale should be confirmed, but the case also noted that "unfairness" is definitely a factor in making a confirmation determination. "Iregularities" [sic] were stated to be grounds for denying

confirmation in *Rodolf v. First National Bank and Trust Company of Tulsa,* 182 Okl. 426, 78 P2d 296 (1938).

As this Honorable Court knows, the length of the hearing is not the test of whether a trial court's ruling should be upheld or not; the result is what must be reviewed on appeal. The result in this case certainly would shock even the most callous judicial conscience.

The appellees next contend that the law did not require Union to counterclaim in the first case filed, CJ-86-7721. Western cites 59 *C.J.S.* Mortgages Sec. 488 for the proposition that a junior mortgagee has no equity to compel the foreclosure of a senior mortgage. It should be remembered, however, that it was the Western National Bank which originally chose to join the Union National Bank as a party in the first place. It was concerned enough about other claims in the property upon which it sought foreclosure by stating in paragraph 10 of its petition that the "defendant Union National Bank of Little Rock may claim some right . . . " and in paragraph 11 that "defendant Pray, Walker, Jackman, Williamson, and Marlar may also claim some right. . . . " Western went on to pray that "the defendants, Union National Bank of Little Rock, and Pray, Walker, Jackman, Williamson, and Marlar, *be required* to assert their interest in and to this property . . . " [emphasis added] Before the trial court, therefore, Western obviously felt that Union and Pray, Walker were not only proper parties, but should be "required" to assert their interest in the property. The appellees have not chosen to enlighten this Honorable Court as to why Union did not assert a claim for foreclosure of its mortgage in CJ-86-7721 when, at the time it filed its answer,

the mortgagor was in default according to the petition which it later filed in CJ-87-4317.

There does not appear to be clearly definitive case authority upon this question in the State of Oklahoma. This Honorable Court may therefore choose how it wishes to "plow this new ground." This court, therefore, has the option of holding that foreclosure of the possibly three respective mortgages or liens upon the same property which is the subject matter of these cases could be asserted in as many as three separate cases. Or this court can hold that all of such claims should be asserted in one case. In deciding this question, counsel for the appellants urge that this Honorable Court consider which of the two options will reach a more judicially expedient result. The first option, urged by the appellees, can obviously result in a multiplicity of litigation with confusing and inconsistent results entered by an almost unlimited number of courts. The option urged by the appellants, by contrast, would insure that all claims to the res, the lands and tenements upon which foreclosure is sought, would be all litigated and determined in one case under one judge. There is less possibility of confusion and certainly much more judicial economy.

Under such circumstances, however, the appellants have urged that they are entitled to equity and fairness and Union, under these circumstances, should be entitled to no less. Considering the unsettled state of this particular question, it would only be fair that the cases as they have now been consolidated be returned to the trial court for one journal entry of judgment to be entered, properly deciding all issues in the case rather than causing Union to be defaulted out of its first mortgage.

The appellees next argue that they should be "rescued" from their own "folly" by correction by order nunc pro tunc of Western's scrivener's error in the journal entry of judgment entered in CJ-86-7221 on April 13, 1987. The appellees earnestly proclaim to this Honorable Court that the admitted mistake committed by the appellants in this case was unilateral (with the implication that a unilateral mistake should not be corrected). Conspicuously absent from the paragraphs discussing the appellants' "unilateral" mistake is any reference to Western's "scrivener's error." Counsel for the appellants was always taught in law school that a mistake made by both parties of an instrument was a "bilateral" mistake. However, considering the appellees' previous inference, a bilateral mistake would be grounds for vacation of the sale, so the appellees manage to characterize their mistake as a "scrivener's error" rather than a "bilateral mistake."

The appellees cite a multitude of cases attempting to support this position, arguing that the journal entry of judgment was more of a "contract" between the parties rather than a judgment of the court and that, therefore, the true intent of the parties should govern, citing, among other cases, *Greeson v. Greeson*, 208 Okl. 457, 257 P2d 276 (1953). They fail to explain, however, how the other parties to the case, Philip Wayne Reed and Pray, Walker entered in to this contract without joining in the approval as to form and content of the admittedly erroneous journal entry of judgment.

The fact that the appellants were aware of the first mortgage is not the point of the mistake that they made. The appellants were aware of the first mortgage, but

thought that, since this was a foreclosure sale, that the property was being sold and was available for their purchase. A misunderstanding of the rather obscure words "subject to" (referring to the first mortgage) in the oral reading of the notice of sale may seem appalling to those of us who have devoted our lives to the study and practice of the law. But to laymen such as the appellants who are un-schooled in the law, a foreclosure sale is a foreclosure sale and the property was being sold.

Perhaps, if the appellants had been schooled in the law, they would have been able to arrive at the "equity appraisal of $42,892.12" that the appellee Western arrives at on page 18 of its brief. However, if some subordinate equity was all that was to be sold, why wasn't that subordinate equity appraised, rather than rendering a confusing appraisal of the entire tract? If the property is truly worth $100,000.00, then certainly Western should not be prejudiced if this court reversed the trial court's decision and remanded the case to the trial court with directions to order a new sale. There should still be enough to completely satisfy Western. As it is, the fact that the property was announced to be appraised for $100,000.00 only encouraged the appellants to believe that they were purchasing "a better deal" than was actually the case.

The next point in Western's brief states that at the time of the foreclosure sale in CJ-86-7721 "the attorney fees and costs incurred by Union National had not yet been reduced to judgment and sum certain at the time Western caused notice of the sale to be published." (Appellees Western's brief page 20) This may be technically true, but it is misleading for the point which it

argues. By the time the sale was actually conducted, judgment had been entered in CJ-87-4317, and, if Western had chosen to do so, it could have caused to be announced at the CJ-86-7721 foreclosure sale the precise amount of attorney fees, interest, abstracting costs, advances for taxes, and insurance, etc. which were specifically reduced to judgment on the day prior to the sale (August 24, 1987). The appellees cites *Myers v. Carr*, 173 Okl. 335, 47 P2d 156 (1935) for the proposition that "slight errors are not sufficient to invalidate a sale." This may technically be true, but a close examination of the record in *Myers v. Carr*, indicates that the parties in that case did not make the glaring mistakes that were made in the case at bar. There was more than one case pending before the trial court in *Myers* and they were consolidated. The sum bid at the foreclosure sale was *knowingly* bid subject to a prior mortgage. There were not errors in the judgment itself and therefore the "purchaser had a perfect right to rely on the validity of the judgment and on the fact that all defendants were bound thereby and would be precluded from raising any question as to its validity." It is highly improbable that the *Myers* could would [sic] find the errors abounding in the case at bar to be "slight" ones over which the sales should be nevertheless be confirmed.

The facts adjudicated in the case of *Mehojah v. Moore*, 744 P2d 222 (1987) are not similar to the facts in the case at bar to assist in determining the legislative intent of 12 O.S. Sec. 706(A) which provides that "no judgment rendered by a court of this state or of the United States shall be a lien on the real estate of the judgment debtor in any county until it has been filed in this manner." In *Mehojah*

the judgment creditor filed the proper affidavit giving notice of the judgment approximately one month prior to the conveyance of part of the judgment debtor's property to a third person. The case held that the recorded judgment was a lien against other real property, clearly an upholding the mandate of 12 O.S. Sec. 706(A). Western has cited no authority why this Honorable Court should not enforce the strict provisions of 12 O.S. Sec. 706(A). The failure to do so is a [sic] irregularity which contributes to the numerous others because of which the confirmation of the sale must be reversed.

PROPOSITION II

MATERIAL DAMAGE TO THE PREMISES OCCURRED BETWEEN THE SALE OF CH-86-7721 AND THE CONFIRMATION DATE AND THE CONFIRMATION OF THE SALES SHOULD, THEREFORE, BE REVERSED.

Citing no authority for its assertion in its brief, Union contends that the risk of loss passed to the purchasers, the appellants, when the sale took place. Their rationale is that, because confirmation makes the conveyance retroactive to the date of the sheriff's sale, the risk of loss passed to the purchasers on the date the sale took place.

However, as this Honorable Court knows, the purchasers are not entitled to possession to the property until the date of confirmation of the sale because title does not pass until that date. Indeed, 55 *Am.Jur 2nd* Mortgages Sec. 846 recognizes this problem by stating that material damage which occurs "after the date of the sale, but before conveyance is made . . . " can be grounds for relieving the purchaser of his obligation and recovering the advance payments.

Western counters by contending that the shed upon the property was not a fixture and was, therefore, part of the property sold under the execution sale. Western completely omits any reference whatsoever to the other damage which occurred which was unquestionably part of the fixtures. Significant damage did occur to the premises after the sale, but before confirmation. As set forth in appellants brief in chief, several photographs (Exhibit's B-1 thru B-10) were admitted which were photographs of the damages which witnesses were able to establish as having occurred during the period in question. The photographs included damages to the fireplaces, broken glass, ceiling fan, door bell, the Jen-Air range and oven, the outside light, outside door, roof, ceiling, chandelier, etc. The witness was a contractor who had looked at the house at the request of the Benintendis to see if it was structurally sound when they were going to bid on it. This vandalism was significant, over $10,000.00. This damage was almost 1/3 of the *total bid* paid by the appellants when they purchased the property! The Black's Law Dictionary definition of a fixture cited by Western is not of much assistance to the court either. Apparently, the appellees are not satisfied that the chandelier and other items, even though they were "nailed down," were fixtures when they were removed. The shed was a structure which did not require for its proper use and installation that it be installed in any other way than it was. It was certainly a significant factor in the mind of the appellants. Not only have the appellants now been deprived of their $32,000.00 in cash, but they have also been deprived of what would have been a shed valued at 1/4 of their

purchase price. This Honorable Court should not sanction such unfairness and un-equity.

PROPOSITION III

THIS HONORABLE COURT HAS AN AFFIRMATIVE DUTY TO APPLY EQUITABLE CONSIDERATIONS TO ITS DECISION WHICH MANDATES THE REVERSAL OF THE TRIAL COURT'S JUDGMENTS CONFIRMING THE SALES AND CORRECTING THE JUDGMENT IN CJ-86-7721.

The appellees contend that the cause of the appellants' "self-centered view of the world" was that they had malice of some kind which created the unfortunate set of circumstances in which they now find themselves. Western goes on to imply that the appellants are guilty of the same fraud perpetrated on the court that one of the parties was guilty of in *State ex rel Burke v. Oklahoma City,* 522 P2d 612 (Okl. 1973).

Most of the cases dealing with confirmation of judicial sales address the question of the adequacy of the price paid when challenged by the judgment debtor who desires the highest value possible to be credited against his judgment. Such is clearly not the situation in the case at bar.

Union's characterization of the appellants' actions as a "choice to ignore the sheriff's pronouncements, the pleadings, and the law" is preposterous. Had the appellants known and understood the sheriff's pronouncements, pleadings, and law they would certainly have made no *choice* to give away $32,000.00 in cash of their hard-earned money to the Western National Bank.

Union's next conclusion that "there was no real ambiguity in the journal entry" is equally preposterous. Before it was corrected, it stated exactly what the appellants themselves thought would be the case, that they as the purchasers would own the entire property. The only difference between the mistake of this scrivener and the mistake of the appellants is that the trial court has chosen to "rescue" the "scrivener" from his "folly," but has chosen to allow the appellants to bear the burden of their mistakes to the tune of a loss of $32,000.00 of their own cash. The appellants are obviously unschooled in the law, but the Western National Bank is an experienced commerical [sic] lending institution represented by some of the best attorneys in Tulsa that their coffers can afford. IS THIS *EQUITY*?

Counsel for the appellants strongly urge that this Honorable Court apply the same standard that it said should be applied in *State ex rel Commissioners of the Land Office v. Landess*, Okl. 293 P2d 574 (1956), citing the earlier case of *State ex rel Commissioners of Land Office v. Schneider*, 198 Okl. 697, 181 P2d 975, which held:

> "We there followed the rule that in determining the propriety of confirming a real estate mortgage foreclosure sale, the trial court is not limited to determining the regularity of the sale proceedings but may "examine into equities of the parties associated with facts, circumstances and transactions not involved in the judgment."

When this Honorable Court examines the equities of the parties associated with the facts, circumstances, and transactions both involved and not involved in the judgment, the only equitable alternative is to reverse the confirmation of the sale, and order the property re-sold.

Niether [sic] of the appellees should be prejudiced by this, since the property was appraised at $100,000.00, more than enough to take care of both of them.

CONCLUSION

This Honorable Court is confronted in this case with a tragic set of facts. Through an innocent mistake, the appellants have lost $32,000.00 in cash of their own funds. The appellees urged that they should not be "rescued" from their own "folly."

Yet the mistake of the appellants is the product of the appellees' prosecution of two separate mortgage foreclosure actions, both of which are rife with error. Had there been only one case with one foreclosure sale ordered and the proceeds distributed in accordance with the priority of the mortgages as usually is done, the appellants' mistake would never have occurred. Ironically, the appellees themselves have been just as confused by the two cases as were the appellants.

For example the motion to vacate default judgment filed by Western in CJ-87-4317 has not been ruled on to this day, nor has the motion filed by Union on September 15, 1987 in CJ-86-7721. Nevertheless, the trial court was gracious enough to allow "scriveners" as well as the errors of others in both cases to be corrected by order nunc pro tunc.

Can equity and common fairness grant to these appellants any less? This Honorable Court has always been zealous in fulfilling its constitutional responsibility to afford a remedy for every wrong (Article II Sec. 6 of

the Oklahoma Constitution). The appellants ask this court for no less.

YOUNG & YOUNG

BY: /s/ John M. Young
JOHN M. YOUNG
OBA ID# 9964
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CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 1988, I mailed a true and correct copy of the above and foregoing instrument with postage prepaid to: Julie Thomas Rowland, 5051 South Lewis, 2nd Floor, Tulsa, Oklahoma 74105; Richard H. Davis, Jr., Post Office Box 35606, Tulsa, Oklahoma 74153; Donald E. Pray, 900 Oneok Building, Oneok Plaza, Tulsa, Oklahoma 74103; Philip Wayne Reed, 8723 Winding Trail, Forth [sic] Worth, Texas 76112.

/s/ John M. Young
JOHN M. YOUNG

APPENDIX C

NOT FOR PUBLICATION

IN THE COURT OF APPEALS
FOR THE STATE OF OKLAHOMA

DIVISION NO. III

WESTERN NATIONAL BANK OF TULSA, a national banking association,	)	
APPELLEE,	)	
vs.	)	
UNION NATIONAL BANK OF LITTLE ROCK,	)	
APPELLEE,	)	No. 70,354 cons. w/ No. 70,355
Phillip Wayne Reed, a single man, Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma professional corporation, Defendants,	)	(Filed DEC 19 1989)
and	)	
W.R. BENINTENDI and DOLORES BENINTENDI,	)	
APPELLANTS.	)	

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

HONORABLE DANIEL J. BOUDREAU, JUDGE

AFFIRMED

John M. Young,
YOUNG AND YOUNG,
Sapulpa, Oklahoma — For Appellants,

Julie Thomas Rowland,
ZARBANO, BRIDGER-RILEY, P.C.,
Tulsa, Oklahoma — For Appellee Western Bank,

William D. Hunt,
WILLIAM D. HUNT & ASSOCIATES,
Tulsa, Oklahoma — For Appellee Union Bank.

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Chief Judge:

Appellants seek review of the Trial Court's orders denying Appellants' motions for new trial and confirming sheriff's sales. Appellee Union National Bank of Little Rock (Union) held a first mortgage executed by Defendant Reed covering certain property in Broken Arrow, Oklahoma, in the principal sum of about $62,000. Appellee Western National Bank of Tulsa (Western) held a valid second mortgage from Reed covering the same property in the sum of about $28,000. In December, 1986, upon default by Reed, Western filed its Petition for foreclosure of its second mortgage, naming Reed, Union and defendant professional corporation as interest-holding defendants. Union filed its answer, asserting the superiority of Union's first mortgage. Reed and the professional corporation filed no appearance or answer and were adjudged in default.

In February, 1987, Western filed its motion for summary judgment, seeking foreclosure of its second mortgage subject to the first mortgage claim of Union. By agreed journal entry signed by Union and Western in May, 1987, Western obtained judgment of foreclosure of

its second mortgage, subject to the superior first-mortgage claim of Union. In July, 1987, Union filed a separate action seeking foreclosure of its first mortgage.

Western then sought Special Execution and Order of Sale on the property in fulfillment of its judgment. Western had the property appraised, value determined at $100,000, and in August, 1987, published notice of sheriff's sale of the property subject to the valid first mortgage of Union. At sheriff's sale on August 25, 1987, it was announced that the sale of the property was subject to a mortgage claim. Appellant Delores Benintendi appeared at the sheriff's sale and submitted a bid on the property in the sum of $32,000, which bid was accepted as the highest and best bid.

On August 26, 1987, the day after sheriff's sale and purchase of the property thereat by Appellants, Union filed its journal entry of judgment obtained August 24, 1987, which recited Western's failure to appear and granted foreclosure of Union's first mortgage. On September 10, 1987, Western filed its motion to confirm the previous sheriff's sale. On September 24, 1987, Appellants filed their Motion to Set Aside the sheriff's sale, asserting, in essence, that they were fraudulently induced to purchase the property at sheriff's sale by representations of Western and/or its counsel that the purchase of the property at sheriff's sale was free of any incumberances [sic] of Union or others.

After hearing on Appellants' motion, the Trial Court issued its order confirming Western's sheriff's sale to Appellants, subject to the first mortgage claim of Union. Appellants filed their Motion for New Trial in Western's

action, again seeking to avoid Union's superior claim, and further alleging damage to the property, entitling Appellants' to avoid their purchase. Appellants also filed a motion to consolidate the separate foreclosure actions of Western and Union.

On October 29, sheriff's sale in Union's foreclosure action took place, at which Union was the highest and best bidder, and Union moved to confirm the sale. Appellants moved to intervene in Union's action and objected to confirmation of the sale to Union. Appellants filed amendments to their motion for new trial in Western's action, and all remaining matters in both cases came on for hearing. The Trial Court denied Appellants' motion for new trial arising from confirmation of the Western sale, and overruled Appellants' objections to confirmation of the Union sale. Appellants now seek review of the Trial Court's rulings on the Western sale (Case No. 70,354) and on the Union sale (Case No. 70,355). The cases have been consolidated under surviving Case No. 70,354 for resolution.

In five subsections of their first proposition of error, Appellants argue the Trial Court erred in denying their motion for new trial arising from the Western sale and confirming the Union sale for irregularity in both sale proceedings. In the first subsection, Appellants allege that 12 O.S. Supp. 1984 §2013(A), governing compulsory counterclaims, required Union to press its superior first mortgage claim in Western's prior suit to foreclose the second mortgage, failure in which divested the Trial Court of jurisdiction to entertain Union's subsequent and separate action for foreclosure of the first mortgage. We find, because Western never asserted that its claim was

superior to that of Union, that Union was not an indispensable party to the resolution of Western's claim. See, *Penner v. State, ex rel. Comm'rs. of Land Office*, 302 P.2d 144 (Okl. 1956). Therefore, any claim Union might have had was in the nature of a *permissive* counterclaim, and failure of Union to set up such a permissive claim in the prior action did not divest the Trial Court of Jurisdiction to entertain Union's subsequent action.

In the second subsection, Appellants assert error of the Trial Court in granting Western's oral application for nunc pro tunc amendment of the journal entry in Western's case to reflect (1) correction of the legal description of the property and (2) that Western's judgment of foreclosure was inferior to Union's superior first mortgage claim. In this regard, the journal entry of judgment, as originally prepared and executed by the parties and Court, clearly established that Western's claim was junior and inferior to the claim of Union, but contained conclusory language to the effect that all parties' claims were forever and thereafter barred. Western asserted that this inconsistency within the journal entry was the result of scrivner's error and should be corrected. As we find no reason to dispute Western's allegation of scrivner's error, we find no error by the Trial Court in correcting the journal entry of judgment by order nunc pro tunc to remove any inconsistencies. See, e.g., *Appl. of Okla. Nat. Gas Co.*, 715 P.2d 477 (Okl. 1985) (function of order nunc pro tunc to supply omission on the record of action taken but inadvertently omitted.)

In the third subsection, Appellants argue that the Trial Court erred in denying their Motion for New Trial for failure of the Western sale to bring two-thirds of the

appraised value of the property. We disagree. The property appraised for $100,000, and by the terms of the Western journal entry and notice of sale, was subject to Union's prior mortgage, then amounting to about $57,200. Thus, the sale to Appellants for $32,000 was in an amount in excess of two-thirds of the value of the equity in the property after deduction of the first mortgage amount, and was proper under 12 O.S. 1981 §762. *Miller v. Amercian [sic] Bank & Trust Co.*, 171 Okl. 99, 40 P.2d 1074 (1935); *Hewitt v. Voils*, 147 Okl. 270, 296 P. 447 (1931). The Trial court's denial of Appellants' Motion for New Trial based on alleged insufficiency of the sheriff's sale price was therefore unaffected by error.

In the fourth subsection, Appellants argue inadequacy of the notice of sheriff's sale issued in the Western case due to failure of the notice to specify the amount of attorneys' fees and costs awarded to Union in Union's action. In the fifth subsection, Appellants assert that Union's failure to file its judgment with the County Clerk under 12 O.S. 1981 §706 rendered Union's judgment void. Western's failure to notify prospective purchasers of Union's claim for attorneys' fees has no effect on the Western sale, as the attorney fees and costs awarded to Union arose from an action properly separate and distinct from Western's action. The failure of Union to register its judgment with the clerk under §706 affects only the validity of the judgment as a lien on the judgment debtor's other property within the county, and again has no effect on the validity of the Union sheriff's sale.

In their second proposition of error, Appellants assert that there was substantial damage to the property between Appellants' inspection of the property before

and after the sale. In the main, Appellants assert that a metal storage building on the property at the time of their initial inspection was removed at some time between their inspection and purchase at sheriff's sale, and that this constitutes "material damage" to the property so as to justify relieving Appellants of their obligation to purchase. See, 55 Am.Jur.2d, *Mortgages*, §846 ("A purchaser at a mortgage foreclosure sale may be relieved of his obligation where, after the date of sale, but before conveyance is made, the property is destroyed or materially damaged.")

While we have found no Oklahoma authority directly on-point, and while we have no doubt such a rule would be applied in this state under the proper circumstances, we do not find such to be the case herein. The Trial Court heard the evidence of "damage," and tacitly rejected this argument. Any relief which the Trial Court might grant in such a case is purely equitable, and as with equity decisions by the Trial Court generally, the lower court's determinations will not be disturbed unless against the weight of the evidence or affected by abuse of discretion. We find the Trial Court's implicit rejection of Appellants' assertion of vitiating "damage" neither contrary to the weight of the evidence nor affected by abuse warranting reversal.

In their third proposition, Appellants assert in essence that it is inequitable to force the sale of the property on them subject to the first mortgage of Union when Appellants purchased the property thinking the property to be free and clear of other emcumberances [sic]. Appellants assert hereunder that they were told by an agent of Western that a purchase of the property at

sale would be free and clear of incumberances [sic]. The Trial Court specifically found "[t]he evidentiary material . . . submitted . . . did not support [Appellants'] allegation, and did not support the allegation of any type of fraudulent or inequitable conduct on the part of [Western] that induced [Appellants] . . . to make the subject matter bid." We go no farther than to say that we believe the property was properly sold in satisfaction of Western's second mortgage *subject to the valid first mortgage of Union*. See also, *Sherman v. Gens and Barall Inv. Co.*, 172 Okl. 618, 46 P.2d 491 (1935).

No reversible error of law appears and the findings of fact by the Trial Court are supported by sufficient evidence. The order of the Trial Court is therefore AFFIRMED. Rule 1.202(b), Rules of Appellate Procedure, 12 O.S. 1983 Supp., Ch. 15, App. 2.

HANSEN, P.J. and REYNOLDS, J. concur.

APPENDIX D

No. 70,354

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

W.R. BENINTENDI and DELORES BENINTENDI

Appellants,

vs.

UNION NATIONAL BANK OF LITTLE ROCK;
PHILIP WAYNE REED;
WESTERN NATIONAL BANK OF TULSA;
PRAY, WALKER, JACKMAN, WILLIAMSON &
MARLAR; ANTOINETTE LYNN REED,

Appellees.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

AN APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY STATE OF OKLAHOMA

CASE NO. CJ-86-7721

JUDGE DANIEL J. BOUDREAU

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CERTIFICATE OF MAILING 7

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The appellants claim five general propositions of error which mandated their reversal by this honorable court of the judgments of the court below in confirming the sheriff's sale of the property which is the subject matter of this lawsuit to themselves.

In rejecting the appellants' first subsection of their first proposition of error, this Honorable Court has relied upon *Penner v. State*, 302 P.2nd 144 (Okla. 1956), finding in effect that the claim of Union as the first mortgage holder was in the nature of a permissive counterclaim to the petition for foreclosure filed by Western (the second mortgage holder). This Honorable Court's reliance upon *Penner* was "because Western never asserted that its claim was superior to that of Union, that Union was not an indispensable party to the resolution of Western's claim." It is important to note, however, in Western's petition, it did not allege that it was *inferior* either. The plaintiff's

(Western's) petition in Case No. CJ-86-7721 merely states that "the defendants, Union National Bank of Little Rock, and Pray, Walker, Jackson, Williamson & Marlar be required to asset their interest in and to this property . . . " The plaintiffs in *Penner* alleged that the interest of the defendants in question was inferior and junior to the title of the plaintiffs. Clearly, therefore, the allegations in the petition in the case at bar are much more nebulous, thereby triggering the compulsory counterclaim provisions of 12 O.S. Section 2013 (A), since there is only one res (the mortgaged property) which is in issue in this case. At a minimum the aggravated facts of this case certainly fall within the "exceptional facts" exception noted in the syllabus of the court in *Penner*. The "exceptional facts" in the case at bar are such that, had Union properly alleged its counterclaim, the unfortunate result of the case at bar would never have occurred.

This Honorable Court rejected the appellants' contention in the second subsection of its first proposition by finding "no reason to dispute Western's allegation of scriveners's error," and therefore "no error by the Trial Court in correcting the journal entry of judgment by order nunc pro tunc to remove any inconsistencies," citing *Appl. of Oklahoma Natural Gas Company*, 715 P.2d 477 (Okla. 1985). However, there were no *inconsistencies* in the journal entry of judgment in question in Case No. CJ-86-7721. There is no minute of the court or record of proceedings from which to discern the Trial Court's decision at the time. The journal entry of judgment itself is therefore the judgment of the court and in fact, reflects exactly the understanding of the appellant, Mrs. Benintendi, when she purchased the property in question at

Western's foreclosure sale. As previously stated by the appellants, the truth and fact of the matter is that a bilateral mistake was made by both the appellants and the appellees and equity mandates that it be corrected by the vacation of both orders confirming sale with directions to order a new sale in which the true interest to be sold is properly adjudicated and advertised for sale.

This Honorable Court next decided that, when the property was appraised for $100,000, its sale to the appellants for $32,000 was in excess of two-thirds of the value of the equity because of Union's first mortgage then amounted to about $57,200. The announcement at the sheriff's sale of the appraisal of the property for the sum of $100,000 was unfortunately clearly misleading. The equity being sold was not appraised at $100,000. It was in fact worth much less. This Honorable Court in fact, misapplies the holding in *Miller et al. v. American Nat'l Bank and Trust Co. of Ardmore*, 171 Okla. 99, 40 P.2nd 1074 (1935) upon which it bases its decision. Citing the earlier case of *Hewitt v. Voils*, 147 Okla. 270, 296 P. 447 (1931), *Miller* held that

> " . . . the statute (St. 1931, Section 445) relating to appraisals of property seized under execution requires that the rights and interest of the owner of the property subject to a mortgage or other incumbrance is that interest which must be appraised and sold, and that it is the duty of appraisers to ascertain and estimate the value of such interest, and that a valid sale thereof is had when such interest brings two-thirds of such appraised value."

The appraisers did *not* appraise the equity being sold; they appraised the value of the entire property. Even

though the mathematical calculation to subtract the interest of the first mortgage holder to determine the equity being sold may seem simple to the learned members of this Honorable Court and to counsel involved in the case, the unsophisticated appellants thought that the value of the interest being sold was $100,000. Had a proper appraisal and announcement of that appraisal been made (that the equity being sold was only valued at $42,800, according to this Honorable Court's figures in its memorandum opinion) then the result in the case at bar would undoubtedly be different.

Next this Honorable Court found that the failure of Western's sale to advise potential purchasers of the attorney fees and costs awarded to Union arose from an action properly separate and distinct from Western's action. Even if this Honorable Court is correct that it was a separate and distinct action, which is strenuously disputed by the appellants, (e.g. see appellants' subsection 1 of appellants' first proposition of error) it still nevertheless significantly affects the amount of equity being sold at the second mortgage sale, as any purchasers of the second mortgage would be required to satisfy that amount prior to obtaining good title to the property.

As to appellants' second proposition, this Honorable Court approved the judgment of the trial court that the significant items of damage done to the property were not "material damage" and therefore, even invoking the equitable powers of the court, that intervening damage was not significant enough to warrant vacation of the sale. This Honorable Court does acknowledge a lower court's determination can be disturbed if it is against the weight of the evidence or an abuse of discretion. Even

considering this Honorable Court's calculation of the amount of the equity (not even including the addition of Union's attorney fees) the equity being purchased by the appellants was $42,800. According to the evidence which was not controverted in value, the vandalism done to the property was over $10,000 and was to both the interior and exterior of the premises and outlying buildings. This figure is over 20% of the purchase price of the equity and almost one-third of the total bid paid by the appellants for the property. Further substract [sic] $5,455.00 awarded to Union for its attorney fees, $2,738.34 in prejudgment interest, $219.00 for abstracting, all advances for taxes and hazard insurance, $113.00 and all further costs of service of process, $60.00 and all further costs of maintaining the property, $80.33 and all other late charges, plus all other costs awarded tc Union as set forth in its Journal Entry of Judgment entered on August 27, 1987. The total equity then originally being purchased by the appellants for $32,000.00 is something less than $24,134.33. The appellants again strenuously assert that such a significant portion of the equity and/or bid price can hardly be deemed to be immaterial and not sufficient to mandate reversal.

This Honorable Court has further based its entire consideration of the appellant's third proposition upon an assertion that an agent of Western told them that a purchase of the property would be free and clear of encumbrances. Although the appellants actually in their minds thought this was done, whether it was in fact done or not is only one small aspect of the equitable considerations that the appellants urge this Honorable Court to consider in proposition three. In the confusing facts of

this case it is clear that the appellants made a mistake in their purchase of the property at the second mortgage sale. For whatever reasons, they thought that they were purchasing the entire property. The appellants know that they made this mistake, both Union and Western know that the appellants made this mistake, and this Honorable Court must also certainly realize that the appellants made this mistake. Furthermore, numerous substantive and procedural errors were made by both Western and Union in effecting the respective sheriff's sales. The *only* reason that a foreclosure sale purchaser would *ever* want to purchase a second mortgage holders interest would be if he or she were intending to assume and pay the first mortgage. The appellants in this case *never* had any intention of doing so and did not even bid at the first mortgage sale when it was later conducted. That being their intention, every cent of the purchase price of $32,000 paid in cash to the second mortgage holder is a complete loss to the appellants.

By contrast the second mortgage holders loaned money secured by the real estate in question knowing full well, in advance that they would have only a second mortgage position. Now they are the unwitting very lucky recipients of the appellants' mistake. This is hardly equitable since the mistakes in this case have been made by all parties. The only equitable alternative is to vacate

the disparate sales and order the property sold at a new, properly conducted sheriff's sale.

Respectfully submitted,

By: /s/ John Young
John M. Young
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Sapulpa, Oklahoma 74067

CERTIFICATE OF MAILING

I hereby certify that on the 4 day of January, 1990, I mailed a true and correct copy of the foregoing instrument with postage prepaid to the following:

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William D. Hunt
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Tulsa, Oklahoma 74153

/s/ John Young
John M. Young

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

W.R. BENINTENDI and DELORES BENINTENDI, Appellants,	)	
vs.	)	Case No. 70,354
UNION NATIONAL BANK of LITTLE ROCK, PHILIP WAYNE REED, WESTERN NATIONAL BANK, PRAY WALKER, JACKMAN, WILLIAMSON & MARLAR, ANTOINETTEE LYNN REED. Appellees.	)	

PETITION FOR CERTIORARI

COME NOW THE APPELLANTS and in this their petition for certiorari for this Honorable Court to review the decision of the Court of Appeals below and allege and state:

I.

The opinion from which certiorari is sought was unpublished and a copy is attached as Appendix A.

II.

The memorandum opinion of the Court of Appeals, Division III was filed on December 19, 1989. A petition

for rehearing was denied by order filed with the Clerk of the Court on February 5, 1990.

III.

The case generally involves legal and factual issues arising from two separate foreclosure sales in two separate cases of the same tract of land. This Honorable Court should review the decision of the Court of Appeals for any one or all of the following reasons:

1. The Court of Appeals has decided a question of substance not heretofore determined by this Court on whether a first mortgage holder is required in a foreclosure suit brought by a second mortgage holder to assert by compulsory counterclaim a cause of action for the default of its own mortgage.

2. The Court of Appeals has sanctioned a significant departure from the accepted and usual course of judicial proceedings by allowing an amendment to the first judgment entered in the trial court upon with the appellants' purchase of the property was based to the detriment of the appellants.

3. The Court of Appeals has decided a question of substance not heretofore determined by this Honorable Court but contrary to an older decision of the sister State of Kansas concerning the deduction of the amount of the first mortgage in appraising the value of property sold at a second mortgage sale.

4. The Court of Appeals has decided a question and substance not previously determined by this Honorable Court concerning the sufficiency of the notice of sale of

the second mortgage foreclosure sale in the failure to include the amount of attorney fees and costs awarded in the first mortgage judgment and the failure to record the judgment.

5. The Court of Appeals has sanctioned the departure by the trial court of the accepted and usual course of judicial proceedings in finding that damage to the premises by vandalism from the date of sale to confirmation of over 20% of the purchase price of the equity and almost 1/3 of the total bid was not material.

6. The Court of Appeals has sanctioned the departure of the trial court from the accepted and usual course of judicial proceedings in the fair application of equitable principles in confirming the two foreclosure sales.

IV.

The litigation which precipitated the case at bar before this Honorable Court was commenced by the second mortgage holder (Western National Bank) to foreclose upon its mortgage upon a tract of residential property. Later the first mortgage holder (Union National Bank) filed a second suit seeking foreclosure of its mortgage upon the same property. The appellants purchased the property at the foreclosure sale of the second mortgage holder's suit for $32,000.00 cash, believing that they were purchasing the entire interest in the property. Thereafter the first mortgage holder sold the property at a subsequent sheriff's sale and was itself the successful purchaser, thereby extinguishing the rights of the appellants and causing them to forfeit their purchase price. The appellants objected to confirmation of both sales and,

following hearing, the trial court overruled the objections to confirmation. The Court of Appeals affirmed in the attached memorandum opinion. A number of procedural errors vitiated both proceedings but the trial court either overlooked them or attempted to correct them by orders nunc pro tunc contrary to the usual and accepted course of judicial proceedings. Furthermore the particular issues involved in the two mortgage sales raised legal questions for which there is little or no precedent and, to definitively establish the law on the questions, this Honorable Court should accept certiorari to review the legal issues raised.

In the second mortgage holder's suit, the first mortgage holder was joined as a defendant, and, although its mortgage was then in default, filed an amended answer which failed to allege any default in the payment of the note secured by its first mortgage. The second mortgage holder's suit was reduced to a judgment which directed the sale of the property to satisfy the second mortgage and further directed that the purchaser would be placed in "full and complete possession and enjoyment of said property . . . " in language which was approved by the first mortgage holder.

During the pendency of the second mortgage holder's foreclosure suit, the first mortgage holder filed its own petition for foreclosure, rather than cross petitioning for the foreclosure of its mortgage in the first suit filed. That action, taken for reasons known only to the first mortgage holder, precipitated the inexorable confusion and error which followed. The appellants argued strenuously before both the trial court and the Court of Appeals that 12 O.S. Section 2013(A) specifically required

the first mortgage holder to assert the cause of action which had obviously accrued (since the mortgagors were then in default on both mortgages) in the first suit filed rather than filing a separate suit seeking foreclosure of the same res. The statute and the official commentary clearly require any party in any suit to file any claim which it has against any opposing party (in this case the mortgagors) if it arises out of the same subject matter of the opposing party's claim. Although the opposing party's claim was ultimately to the same real property which secured both mortgages, the Court of Appeals found the first mortgage holder to have a permissive counterclaim which was not required to be alleged in the first case.

As the official commentary indicates, the legislature, with the enactment of 12 O.S. Section 2013(A) in 1984 changed previous Oklahoma law by compelling the assertion of existing counterclaims. The purpose was obviously to reduce the multiplicity of litigation and to require that single issues involving the same set of facts or subject matter be resolved in the same case. The statute was recently enacted, but the Court of Appeals, in denying the appellants' argument, relied on a case decided *before* the enactment of the statute, *Penner v. State ex rel. Commissioners of Land Office*, 302 P.2d 144 (Okl. 1956), the facts of which are not sufficiently analogous to the case at bar to be a definitive resolution of the question. There is therefore a significant issue of law which routinely affects practioners in this field of the law which should be resolved by this Honorable Court by certiorari. The danger of allowing multiple suits is painfully demonstrated in the case at bar.

The journal entry of judgment entered which was approved as to both form and content by attorneys for both the first and second mortgage holders omitted any reference to the county and state of the property upon which foreclosure was intended and provided that the sale pursuant to that judgment would forever bar any other claimant from asserting title to the property. The understanding of the appellants when they purchased the property at the second mortgage holder's foreclosure sale was that they were purchasing the entire interest in the property and that it would be subject to no other claimants. When the appellants brought the issue before the trial court that the judgment itself was consistent with the appellants' beliefs the trial court attempted to "correct" the judgment by order nunc pro tunc. When the appellants suggested that they too had made a mistake in their understanding of the terms of the purchase, the trial court refused to correct their mistake, with the result that they have been caused to forfeit their $32,000 cash purchase price. It is contrary to the accepted and usual course of judicial proceedings to allow such an inequitable and one-sided correction of the errors by one party and to require the other party to bear the effect of their errors.

Prior to the sale the property was appraised for $100,000.00. 12 O.S. Section 762, of course, requires that all sales be made for at least ⅔ of the appraised value of the property, but the purchase price at that mortgage sale was only $32,000. In an older, but precisely analogous case, *DeJarnett v. Verner*, 40 Kans. 224, 19 P. 66, invalidated a foreclosure sale which was subject to a first mortgage and which was for less than ⅔ of the appraised value of

the whole tract, but which would have been for at least 2/3 of the equity after deducting the first mortgage. It is clear that sales for less than 2/3 of the appraised value are nullities, *Page v. Turk*, 43 Okl. 667, 143 P. 1047 (1914). But are the appraisers required to appraise the value of the equity being sold (which in the case at bar was subject to a first mortgage) or are they required to appraise the total value of the property? There is an absence of recent authority on this very common problem and this Honorable Court should assume certiorari to provide a definitive ruling upon this question. To allow the sale to be conducted for an apparently inflated appraised value subject to a significant first encumbrance presents a misleading value of the equity actually being sold to potential purchasers such as the appellants herein.

Related to the appellants' previous contention is their argument that the notice of sale of the second mortgage foreclosure sale failed to advise purchasers of the amount of attorney fees and costs, totalling almost $6,000.00 which had by that time been reduced to judgment in the first mortgage holder's suit.

Evidence was also introduced at the hearing that vandalism to the property between the time of sale and the time of confirmation exceeded $10,000.00. Deducting the value of the attorney fees and costs previously referred to and the amount of the first mortgage, the equity (if any) purchased by the appellants for $32,000.00 was actually something less than $24,000.00. While there was no Oklahoma law located by the parties or the courts below on the question, neither the trial court nor the Court of Appeals disputed the general rule set forth in 55 *Am.Jur.2d* Mortgages, Section 846, that material damage

to the premises may negate a sale. The failure to find this amount of vandalism equalling almost a third of the purchase price, however, especially when coupled with the failure to give notice of the amount of the first mortgage, costs, and attorney fees, is material and the result so inequitable as to necessitate this Honorable Court's exercise of its superintending power of review to vacate the sales.

The appellants last assert that the end result of this case is so inequitable that this Honorable Court's superintending power of review and good judicial conscience merit intervention. The second mortgage holder, a major lending institution, well knew that it would be subordinate to a large first mortgage. The appellants, however, are unlearned in the law and did not realize this when they purchased the property at the second mortgage holder's foreclosure sale. Ironically, the court judgment supported the appellants' position. The trial court nevertheless saw fit to correct what it found to be mistakes made by the scriveners of the judgment, but forced the appellants to bear the cost of their mistake. The Court of Appeals affirmed this great inequity which is contrary to the usual and accepted course of judicial proceeding to administer justice to all litigants fairly and equally. The most equitable result in the case would be for both sales below to be invalidated, for both cases to be consolidated, and for one new sale to be ordered properly advising potential purchasers of the accurate terms of the sale. This Honorable Court should grant certoriari to establish definitive authority on the issues raised by the case which are not well established as well as to correct the inequitable departures from normal judicial procedure. The

denial of certiorari will sanction the appellants' forfeiture of the $32,000.00 purchase price paid.

Respectfully submitted,

/s/ John Young
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CERTIFICATE OF MAILING

I hereby certify that on the 23 day of February, 1990, I mailed a true and correct copy of the foregoing instrument with postage prepaid to the following:

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/s/ John Young
John M. Young

NOT FOR PUBLICATION

IN THE COURT OF APPEALS FOR THE
STATE OF OKLAHOMA

DIVISION NO. III

WESTERN NATIONAL BANK OF TULSA, a national banking association, APPELLEE, vs. UNION NATIONAL, BANK OF LITTLE ROCK, APPELLEE, Phillip Wayne Reed, a single man, Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma professional corporation, Defendants, and W.R. BENINTENDI and DELORES BENINTENDI, APPELLANTS.	No. 70,354 cons. w/ No. 70,355 (Filed Dec. 19, 1989)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE DANIEL J. BOUDREAU, JUDGE

AFFIRMED

John M. Young,
YOUNG AND YOUNG,
Sapulpa, Oklahoma For Appellants,

Julie Thomas Rowland,
ZARBANO, BRIDGER-
RILEY, P.C.,
Tulsa, Oklahoma — For Appellee Western Bank,

William D. Hunt,
WILLIAM D. HUNT &
ASSOCIATES,
Tulsa, Oklahoma — For Appellee Union Bank.

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Chief Judge:

Appellants seek review of the Trial Court's orders denying Appellants' motions for new trial and confirming sheriff's sales. Appellee Union National Bank of Little Rock (Union) held a first mortgage executed by Defendant Reed covering certain property in Broken Arrow, Oklahoma, in the principal sum of about $62,000. Appellee Western National Bank of Tulsa (Western) held a valid second mortgage from Reed covering the same property in the sum of about $28,000. In December, 1986, upon default by Reed, Western filed its Petition for foreclosure of its second mortgage, naming Reed, Union and defendant professional corporation as interest-holding defendants. Union filed its answer, asserting the superiority of Union's first mortgage. Reed and the professional corporation filed no appearance of answer and were adjudged in default.

In February, 1987, Western filed its motion for summary judgment, seeking foreclosure of its second mortgage subject to the first mortgage claim of Union. By agreed journal entry signed by Union and Western in May, 1987, Western obtained judgment of foreclosure of

its second mortgage, subject to the superior first-mortgage claim of Union. In July, 1987, Union filed a separate action seeking foreclosure of its first mortgage.

Western then sought Special Execution and Order of Sale on the property in fulfillment of its judgment. Western had the property appraised, value determined at $100,000, and in August, 1987, published notice of sheriff's sale of the property subject to the valid first mortgage of Union. At sheriff's sale on August 25, 1987, it was announced that the sale of the property was subject to a mortgage claim. Appellant Delores Benintendi appeared at the sheriff's sale and submitted a bid on the property in the sum of $32,000, which bid was accepted as the highest and best bid.

On August 26, 1987, the day after sheriff's sale and purchase of the property thereat by Appellants, Union filed its journal entry of judgment obtained August 24, 1987, which recited Western's failure to appear and granted foreclosure of Union's first mortgage. On September 10, 1987, Western filed its motion to confirm the previous sheriff's sale. On September 24, 1987, Appellants filed their Motion to Set Aside the sheriff's sale, asserting, in essence, that they were fraudulently induced to purchase the property at sheriff's sale by representations of Western and/or its counsel that the purchase of the property at sheriff's sale was free of any incumberances of Union or others.

After hearing on Appellants' motion, the Trial Court issued its order confirming Western's sheriff's sale to Appellants, subject to the first mortgage claim of Union. Appellants filed their Motion for New Trial in Western's

action, again seeking to avoid Union's superior claim, and further alleging damage to the property, entitling Appellants' to avoid their purchase. Appellants also filed a motion to consolidate the separate foreclosure actions of Western and Union.

On October 29, sheriff's sale in Union's foreclosure action took place, at which Union was the highest and best bidder, and Union moved to confirm the sale. Appellants moved to intervene in Union's action and objected to confirmation of the sale to Union. Appellants filed amendments to their motion for new trial in Western's action, and all remaining matters in both cases came on for hearing. The Trial Court denied Appellants' motion for new trial arising from confirmation of the Western sale, and overruled Appellants' objections to confirmation of the Union sale. Appellants now seek review of the Trial Court's rulings on the Western sale (Case No. 70,354) and on the Union sale (Case No. 70,355). The cases have been consolidated under surviving Case No. 70,354 for resolution.

In five subsections of their first proposition of error, Appellants argue the Trial Court erred in denying their motion for new trial arising from the Western sale and confirming the Union sale for irregularity in both sale proceedings. In the first subsection, Appellants allege that 12 O.S. Supp. 1984 § 2013(A), governing compulsory counterclaims, required Union to press its superior first mortgage claim in Western's prior suit to foreclose the second mortgage, failure in which divested the Trial Court of jurisdiction to entertain Union's subsequent and separate action for foreclosure of the first mortgage. We find, because Western never asserted that its claim was

superior to that of Union, that Union was not an indispensable party to the resolution of Western's claim. See, *Penner v. State, ex rel. Comm'rs. of Land Office*, 302 P.2d 144 (Okl. 1956). Therefore, any claim Union might have had was in the nature of a *permissive* counterclaim, and failure of Union to set up such a permissive claim in the prior action did not divest the Trial Court of jurisdiction to entertain Union's subsequent action.

In the second subsection, Appellants assert error of the Trial Court in granting Western's oral application for nunc pro tunc amendment of the journal entry in Western's case to reflect (1) correction of the legal description of the property and (2) that Western's judgment of foreclosure was inferior to Union's superior first mortgage claim. In this regard, the journal entry of judgment, as originally prepared and executed by the parties and Court, clearly established that Western's claim was junior and inferior to the claim of Union, but contained conclusory language to the effect that all parties' claims were forever and thereafter barred. Western asserted that this inconsistency within the journal entry was the result of scrivner's error and should be corrected. As we find no reason to dispute Western's allegation of scrivner's error, we find no error by the Trial Court in correcting the journal entry of judgment by order nunc pro tunc to remove any inconsistencies. See, e.g., *Appl. of Okla. Nat. Gas Co.*, 715 P.2d 477 (Okl. 1985) (function of order nunc pro tunc to supply omission on the record of action taken but inadvertently omitted.)

In the third subsection, Appellants argue that the Trial Court erred in denying their Motion for New Trial for failure of the Western sale to bring two-thirds of the

appraised value of the property. We disagree. The property appraised for $100,000, and by the terms of the Western journal entry and notice of sale, was subject to Union's prior mortgage, then amounting to about $57,200. Thus, the sale to Appellants for $32,000 was in an amount in excess of two-thirds of the value of the equity in the property after deduction of the first mortgage amount, and was proper under 12 O.S. 1981 § 762. *Miller v. American Bank & Trust Co.*, 171 Okl. 99, 40 P.2d 1074 (1935); *Hewitt v. Voila*, 147 Okl. 270, 296 P. 447 (1931). The Trial Court's denial of Appellants' Motion for New Trial based on alleged insufficiency of the sheriff's sale price was therefore unaffected by error.

In the fourth subsection, Appellants argue inadequacy of the notice of sheriff's sale issued in the Western case due to failure of the notice to specify the amount of attorneys' fees and costs awarded to Union in Union's action. In the fifth subsection, Appellants assert that Union's failure to file its judgment with the County Clerk under 12 O.S. 1981 § 706 rendered Union's judgment void. Western's failure to notify prospective purchasers of Union's claim for attorneys' fees has no effect on the Western sale, as the attorney fees and costs awarded to Union arose from an action properly separate and distinct from Western's action. The failure of Union to register its judgment with the clerk under § 706 affects only the validity of the judgment as a lien on the judgment debtor's other property within the county, and again has no effect on the validity of the Union sheriff's sale.

In their second proposition of error, Appellants assert that there was substantial damage to the property between Appellants' inspection of the property before

and after the sale. In the main, Appellants assert that a metal storage building on the property at the time of their initial inspection was removed at some time between their inspection and purchase at sheriff's sale, and that this constitutes "material damage" to the property so as to justify relieving Appellants of their obligation to purchase. See, 55 Am.Jr.2d, *Mortgages*, § 846 ("A purchaser at a mortgage foreclosure sale may be relieved of his obligation where, after the date of sale, but before conveyance is made, the property is destroyed or materially damaged.")

While we have found no Oklahoma authority directly on-point, and while we have no doubt such a rule would be applied in this state under the proper circumstances, we do not find such to be the case herein. The Trial Court heard the evidence of "damage," and tacitly rejected this argument. Any relief which the Trial Court might grant in such a case is purely equitable, and as with equity decisions by the Trial Court generally, the lower court's determinations will not be disturbed unless against the weight of the evidence or affected by abuse of discretion. We find the Trial Court's implicit rejection of Appellants' assertion of vitiating "damage" neither contrary to the weight of the evidence nor affected by abuse warranting reversal.

In their third proposition, Appellants assert in essence that it is inequitable to force the sale of the property on them subject to the first mortgage of Union when Appellants purchased the property thinking the property to be free and clear of other encumberances. Appellants assert hereunder that they were told by an agent of Western that a purchase of the property at sale

would be free and clear of incumberances. The Trial Court specifically found "[t]he evidentiary material . . . submitted . . . did not support [Appellants'] allegation, and did not support the allegation of any type of fraudulent or inequitable conduct on the part of [Western] that induced [Appellants] . . . to make the subject matter bid." We go no farther than to say that we believe the property was properly sold in satisfaction of Western's second mortgage *subject to the valid first mortgage of Union*. See also, *Sherman v. Gens and Marall Inv. Co.*, 172 Okl. 618, 46 P.2d 491 (1935).

No reversible error of law appears and the findings of fact by the Trial Court are supported by sufficient evidence. The order of the Trial Court is therefore AFFIRMED. Rule 1.202(b). Rules of Appellate Procedure, 12 O.S. 1983 Supp., Ch. 15, App. 2.

HANSEN, P.J. and REYNOLDS, J. concur.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, May 8, 1990

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

70,354 (consolidated with 70,355) Western National Bank of Tulsa, a national banking association et al. v. W. R. Benintendi and Delores Benintendi.
Certiorari denied.
All Justices concur.

70,637 In the Matter of the Sales Tax Protest of Five-M Exploration Company.
Five-M Exploration Company v. State of Oklahoma ex rel. Oklahoma Tax Commission.
Certiorari denied.
CONCUR: Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Kauger, Summers, JJ.
DISSENT: Hargrave, C.J.

71,322 In the Matter of the Sales Tax Protest of Gerald Virgin d/b/a G. V. Leasing.
Gerald Virgin d/b/a G. V. Leasing v. State of Oklahoma ex rel. Oklahoma Tax Commission.
Certiorari denied.
CONCUR: Opala, V.C.J., Hodges, Lavender, Kauger, Summers, JJ.
DISSENT: Hargrave, C.J., Simms, Doolin, JJ.

74,924 Mac Engineering & Operating Company et al. v. Mid-Continent Casualty Company.
Petition for certiorari to review certified interlocutory order denied.
CONCUR: Opala, V.C.J., Hodges, Lavender, Simms, Doolin, JJ.
DISSENT: Hargrave, C.J., Wilson, Kauger, Summers, JJ.

74,942 Mac Engineering & Operating Company v. Mid-Continent Casualty Company.
Petition for certiorari to review certified interlocutory order denied.
CONCUR: Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, C.J.

75,094 E. W. Jiles, E. W. Jiles, Trustee of the E. W. Jiles trust and Jico, Inc. v. The Hon. David Barnett.
Application to assume original jurisdiction denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Lavender, Simms, Doolin, Wilson, Kauger, Summers, JJ.

75,280 Melvin Leroy Mahler v. The Court of Criminal Appeals and The State of Oklahoma.
Application to assume original jurisdiction denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, Kauger, JJ.
CONCUR BY REASON OF STARE DECISIS: Summer, J.

/s/ Rudolph Hargrave
CHIEF JUSTICE